(11)

No. 98-131-CFY Title: United States, Petitioner
v.
Sun-Diamond Growers of California

Docketed: July 21, 1998 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jul 21 1998	Petition for writ of certiorari filed. (Response due August 28, 1998)
	Aug 11 1998	Order extending time to file response to petition until August 28, 1998.
	Aug 27 1998	Motion of Public Citizen for leave to file a brief as amicus curiae filed.
	Aug 28 1998	Brief of respondent Sun-Diamond Growers of California in opposition filed.
	Sep 22 1998	Reply brief of petitioner United States filed.
	Oct 14 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	Motion of Public Citizen for leave to file a brief as amicus curiae GRANTED.
	Nov 2 1998	Petition GRANTED. limited to the following question: Is the requirement in 18 U.S.C. Sec. 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the receipient's official position? SET FOR ARGUMENT March 2, 1999. **********
	Dec 17 1998	Brief of petitioner United States filed.
	Dec 17 1998	Brief amicus curiae of United States Department of Justice filed.
	Jan 12 1999	Record filed.
	Jan 13 1999	Record filed.
	Jan 14 1999	CIRCULATED.
	Jan 19 1999	Brief of respondent Sun-Diamond Growers of California filed.
	Jan 19 1999	Brief amicus curiae of National Association of Criminal Defense lawyers filed.
	Jan 19 1999	Brief amicus curiae of American League of Lobbyists filed.
	Feb 18 1999	Reply brief of petitioner United States filed.
	Mar 2 1999	ARGUED.

Supreme Court, U.S.
FILED

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No. 98-

IN THE

Supreme Court of the United States

October Term, 1997

United States of America,

Petitioner,

v.

Sun-Diamond Growers of California,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), which proscribes the giving of anything of value to a federal official "for or because of any official act performed or to be performed by such public official," prohibit a large, agricultural cooperative regulated by the United States Department of Agriculture from bestowing on the Secretary of Agriculture, because of his position, tickets to sporting events, meals, luggage and other gifts, or was the court below correct in reversing the conviction in this case and thereby creating an acknowledged conflict with other circuits that have considered the issue?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 11

I. The District Of Columbia Circuit's Interpretation of 18 U.S.C. § 201(c)(1)(A), A Statute That Prohibits The Giving Of Unlawful Gratuities To Federal Officials, Creates An Acknowledged And Irreconcilable Split Of Authority In The Federal Courts Of Appeal 11

A. The D.C. Circuit's Decision In This Case Creates A Significant Split Of Authority On An Important Issue Of Federal Law 12

B. The D.C. Circuit's Decision Seriously Undermines The Enforcement Of An Important Federal Criminal Statute Designed To Promote Government Integrity 21

II. The District Of Columbia Circuit's Decision Is Arguably Inconsistent With A Prior Decision Of This Court 24

CONCLUSION 28

Appendix A: *United States v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998) .... App. 1

Page

Appendix B: Order denying the United States' petition for rehearing and suggestion for rehearing *en banc* ..... App. 32

Appendix C: *United States v. Sun-Diamond Growers of California*, 941 F. Supp. 1262 (D.D.C. 1996)..... App. 35

Appendix D: Relevant Jury Instructions ..... App. 67

TABLE OF AUTHORITIES

Cases: **Page**

Bustamante v. United States, No. 95-60, 516 U.S. 973 (1995) 19

Morrison v. Olson, 487 U.S. 654 (1988) 2

Standefer v. United States, 444 U.S. 1011 (1980) 26

Standefer v. United States, 447 U.S. 10 (1980) 10, 18, 24-27

United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976) 8, 13, 14-15

United States v. Barash, 412 F.2d 26 (2d Cir. 1969) 13, 17

United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988) 18

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 6-8, 27

United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) 8, 13, 18-19

United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982) 8, 10

United States v. Evans, 572 F.2d 455 (5th Cir. 1978) 8, 13, 15-16, 18

United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) 13, 16-17

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) 17, 22

United States v. Johnson, 621 F.2d 1073 (10th Cir. 1980) 20

United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991) 9, 20

Page

United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978) 13, 14, 18

United States v. Patel, 32 F.3d 340 (8th Cir. 1994) 20

United States v. Previtte, 648 F.2d 73 (1st Cir. 1981) 19

United States v. Providence Journal Co., 485 U.S. 693 (1988) 1

United States v. Sawyer, 85 F.3d 723 (1st Cir. 1996) 9, 19

United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) 8, 13, 18, 25, 28

United States v. Strand, 574 F.2d 993 (9th Cir. 1978) 15

United States v. Umans, 368 F.2d 725 (2d Cir. 1966) 8, 13, 17

Statutes:

18 U.S.C. § 201(a)(3) 2

18 U.S.C. § 201(c) ..... *passim*

18 U.S.C. § 201(f) 14, 24

18 U.S.C. § 201(g) 14, 24

28 U.S.C. § 518(a) 1

28 U.S.C. § 594(a)(9) 1

Page

Other Sources:

Department of Justice, *United States Attorneys Manual* § 9-85.101 (Sept. 1997) 21

Federal Ethics Report (May 1998) 23

H.R. Rep. No. 748, 87th Cong., 1st Sess. (July 20, 1961) 23, 24

Daniel H. Lowenstein, *Political Bribery And The Intermediate Theory Of Politics*, 32 U.C.L.A. L. Rev. 784 (1985) 22

Note, *Campaign Contributions And Federal Bribery Law*, 92 Harv. L. Rev. 451 (1978) 21-22

Joseph R. Weeks, *Bribes, Gratuities and the Congress: The Institutionalized Corruption Of The Political Process, The Impotence Of Criminal Law To Reach It, And A Proposal For Change*, 13 J. Legis. 123 (1986) 22

Charles N. Whitaker, Note, *Federal Prosecution Of State And Local Bribery: Inappropriate Tools And The Need For A Structured Approach*, 78 Va. L. Rev. 1617 (1992) 22

Petition for a Writ of Certiorari in *Standefer v. United States*, No. 79-383 25-26

Brief for Petitioner in *Standefer v. United States*, No. 79-383 26

Brief for the United States in *Standefer v. United States*, No. 79-383 26

Reply Brief for Petitioner in *Standefer v. United States*, No. 79-383 26-27

Appendix in *Standefer v. United States*, No. 79-383 28

OPINIONS BELOW

The March 20, 1998, decision of the United States Court of Appeals for the District of Columbia Circuit invalidating the conviction of Sun-Diamond Growers of California under the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), is reported at 138 F.3d 961 (D.C. Cir. 1998), and is included as Appendix A. The June 18, 1998 orders of the District of Columbia Circuit denying the United States' timely petition for rehearing and suggestion for rehearing *en banc* (Wald, J., concurring) are included as Appendix B. The District Court's decision denying Sun-Diamond's pretrial motion to dismiss the unlawful gratuity counts is reported at 941 F. Supp. 1262 (D.D.C. 1996), and is included as Appendix C.

JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The District of Columbia Circuit issued its decision on March 20, 1998, and denied the United States' timely petition for rehearing and suggestion for rehearing *en banc* on June 18, 1998. This petition has been filed within ninety days of the Circuit's denial of rehearing as required by Supreme Court Rule 13.1.[1]

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[1] Independent Counsels appointed pursuant to the Ethics in Government Act have the express statutory authority to initiate and conduct prosecutions "in any court of competent jurisdiction," and that authority includes "handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a)(9). As this Court has previously suggested in an opinion, and in practice has recognized, § 594(a)(9) is an express exception to the general rule of 28 U.S.C. § 518(a) that "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . ." *See United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) ("Congress has enacted some provisions that suggest exceptions to the blanket coverage of § 518(a)"

STATUTORY PROVISIONS INVOLVED

The unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), provides in relevant part as follows:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

"Official act" is defined as

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3)

STATEMENT

The decision below raises serious, unresolved questions about an important federal anti-corruption statute, causing one Circuit Judge to write:

> I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention.

(Wald, J., concurring in the denial of suggestion for rehearing *en banc*) App. 34. (internal citations omitted).

(citing § 594(a)(9) as an example)); *see also Morrison v. Olson*, 487 U.S. 654 (1988) (Independent Counsel, petitioner in the case, appeared *pro se*).

1. Independent Counsel Donald C. Smaltz, representing the United States, is responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Alphonso Michael Espy. Sun-Diamond Growers of California is a large agricultural cooperative owned by several individual member cooperatives. As a result of the Government's investigation, Sun-Diamond was charged with giving unlawful gratuities to Secretary Espy, committing wire fraud, and making illegal campaign contributions. App. 2.

Linking Sun-Diamond and Secretary Espy was Richard Douglas. As Sun-Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun-Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun-Diamond's president, Douglas was a diligent and able representative. Douglas once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Secretary Espy — the two had gone to college together. App. 2. At trial, Sun-Diamond's principal defense to the unlawful gratuity charges was that the gifts provided to Espy fell outside the scope of § 201(c) because they were given out of friendship. Sun-Diamond, of course, as a corporation and the actual defendant in this case, could make no claim to "personal friendship" with Secretary Espy.

Count I of the indictment charged Sun-Diamond with giving Secretary Espy approximately $5,900 in unlawful

gratuities: tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524. The indictment further alleged that Sun-Diamond treated the costs of these gifts to Secretary Espy as business expenses. App. 4. Count II charged Sun-Diamond with paying $3,100 for Secretary Espy's girlfriend to accompany him to the International Nut Conference in Athens, Greece. App. 4 n.1; *id.* at 36.

The indictment detailed two specific issues on which Sun-Diamond had a clear interest in obtaining favorable action from Secretary Espy. App. 3. The first was the market promotion program ("MPP"), a grant fund administered by USDA and designed to promote U.S. agricultural exports. The Secretary of Agriculture was authorized to allocate MPP money to trade organizations like Sun-Diamond, that would in turn use it to defray overseas marketing expenses. Between 1990 and 1995, the Sun-Diamond member cooperatives received $23.9 million from MPP. In August 1993, Congress enacted budget legislation requiring the Secretary to give preference to "small-sized entities" in disbursing MPP funds. Sun-Diamond and its members were hardly mom-and-pop organizations — they reported net sales of $648 million for fiscal year 1993 — but many of their constituent growers were quite modest in size. Sun-Diamond therefore wanted the Secretary to adopt a regulatory definition of "small-sized entities" that would include cooperatives such as its members. App. 3-4.

Sun-Diamond also took an interest in federal regulation of methyl bromide, a pesticide used by some of the growers who belonged to Sun-Diamond's member cooperatives. In late 1992, the Environmental Protection Agency began review of a proposal to phase out the use of the chemical in the United States because of its potential to contribute to ozone depletion. The evidence presented at trial showed that Sun-Diamond wanted Secretary Espy to help persuade the EPA to delay or reject the proposed phase-out. App. 4.

2. Sun-Diamond moved to dismiss the unlawful gratuity counts in the indictment on several grounds. *See* App. 37-53. Pertinent to this petition, Sun-Diamond argued that the indictment was defective because it failed to allege a nexus between the gratuities given to Secretary Espy and specific official acts the Secretary performed. App 38-39. The District Court rejected Sun-Diamond's argument, declaring that "[t]his District Court and the various federal courts of appeal that have addressed this precise issue have concluded that the gratuity statute does not require such nexus . . ." App 42. Instead, the District Court concluded that an indictment is sufficient if it alleges that the giver of the gratuity has matters "within the purview of the official receiving the gratuity" *and* the gratuity was given because of the official's position. *Id.* The District Court further opined that its reading of the statute was consistent with D.C. Circuit precedent and the decisions of other circuits that "have similarly given Section 201(c) a broad interpretation." App 45.

Following a trial, the District Court extensively instructed the jury regarding the unlawful gratuity counts under § 201(c)(1)(A). *See* App. 67-90. The instructions in several places repeated verbatim the statutory language that, in order to convict, the gratuities must have been given to Secretary Espy by Sun-Diamond "for or because of official acts" that the Secretary either had performed or might perform in the future. App. 82-89. The instructions also stated in several places that, if the jury found that Sun-Diamond was motivated to give the gratuities to Secretary Espy because of his official position as the Secretary of Agriculture, then it could convict under § 201(c)(1)(A). App. 82-89. The complete § 201(c)(1)(A) jury instructions are set forth as Appendix D. With respect to the unlawful gratuity charges, the jury convicted Sun-Diamond on Count I (gratuities given directly to Secretary Espy), but acquitted on Count II (payment for the Secretary's girlfriend to travel with him).

3. On appeal, Sun-Diamond challenged its conviction on Count I, renewing its argument that the unlawful gratuity statute requires the government to prove a nexus between each unauthorized gift and some specifically identified official act — performed or hoped to be performed — for which the payment or gift was given. Because the indictment failed to allege any such one-to-one relationship, Sun-Diamond contended, the district court erred in denying Sun-Diamond's motion to dismiss Count I. App 4. In a narrower variation on that argument, Sun-Diamond also challenged the jury instructions on Count I, arguing that the instructions impermissibly allowed the jury to convict if it found that Sun-Diamond gave Secretary Espy things of value merely in recognition of his *official position*, regardless of official acts that might have supplied the motivation. App 5. The D.C. Circuit purported to reject Sun-Diamond's broader challenge to the indictment but agreed with Sun-Diamond's challenge to the jury instructions. *Id.*

In the D.C. Circuit's view, the district court charged the jury in full accord with the theory that gifts motivated by an official's status or position run afoul of the unlawful gratuity statute, regardless of whether the donor had any intent to affect or reward official conduct. *Id.* Quoting selectively from the jury instructions, the Court of Appeals emphasized those instructions that focused on or mentioned the gratuity recipient's official status. App 5-7. The Court opined that the language of the jury charge was far broader than that of the statute. App 7. According to the D.C. Circuit, to satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some specific, favorable future act or acts. *Id.* Relying on its prior decision in *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974), the Court distinguished the crime of bribery from the crime of giving an unlawful gratuity as follows:

> The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

App. 7-8. The Court opined that,

> As [*Brewster*] makes tolerably clear, to say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. But the gratuity statute by its terms does still require at least a unidirectional relationship--the gift must be "for or because of" the act.

App. 8. The Court then observed that

> The relation may be simply one of reward. * * * Even in such a case, the giver presumably hopes that his gratuity will affect the recipient's future conduct — and this was undoubtedly the concern that motivated Congress to bring rewards for past acts within the coverage of the statute. But, in contrast to bribery, it is enough under the gratuity statute if the defendant gives an unpromised benefit for a past governmental favor. And, whatever degree of intent to influence may be necessary for a bribe, a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts.

Id.

The Court of Appeals acknowledged that its decision in *Brewster* was perhaps distinguishable, because it involved

campaign contributions to a Senator and, therefore, implicated the First Amendment. App 9. The Court also acknowledged that in a footnote in *Brewster* it left open the question of what standard would be appropriate when applying the unlawful gratuity provision to appointed officials, an issue it later addressed in *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982). App. 9. The Court, however, read its decision in *Campbell* — which involved free moving services given to a superior court judge by a company that he had treated remarkably leniently with respect to its more than 1,000 traffic tickets — to require proof that the defendant's intent was more than some vague hope of inducing warm feelings toward the donor. *Id.* Thus, the D.C. Circuit concluded that if Sun-Diamond "furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury could find that [Sun-Diamond through] Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." App. 10.

The Court of Appeals acknowledged that its reading of § 201(c)(1)(A) is in conflict with the prevailing interpretation in the Circuits, which is that payments or gifts motivated by the recipient's official position, at least when the official is in a position to make decisions affecting the giver, may be unlawful gratuities. App 11-12 (citing *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (*en banc*); *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976)). The Court summarily rejected that interpretation, observing simply that

> [t]hese decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. * * * Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*.

App. 11-12.[2]

Following its rejection of the prevailing interpretation, the D.C. Circuit concluded that

> the jury instructions [in this case] invited the jury to convict on materially less evidence than the statute demands — evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

App. 12-13. The Court rejected any argument that the jury instructions as a whole accurately reflected the "for or because of any official act performed or to be performed" language of the statute even though numerous times the instructions repeated that language verbatim, finding that such

> recitations could not possibly, however, have overcome the broader message. Thus the charge failed to give the jury an adequate understanding of the issues, and the error cannot be called technical or harmless.

App. 13 (internal citations omitted).

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[2] The D.C. Circuit pointed to two decision that it described as "out-of-circuit cases [that] seem to take the official act requirement more seriously." App. 12 (citing *United States v. Muldoon*, 931 F.2d 282 (4th Cir. 1991), and *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996)). These cases are addressed below.

Finally, the D.C. Circuit purported to reject Sun-Diamond's argument that the Government is required to prove a nexus between a gratuity and a specific past or future official act in order to sustain a conviction under § 201(c)(1)(A). App 13-14. The Court concluded that a similar argument had been made in *United States v. Campbell* but was rejected there. In the D.C. Circuit's words, the Government is not required to prove a nexus between specific official acts and the gratuity, only "the requisite intent to reward past favorable acts or to make future ones more likely." *Id.*

4. On June 18, 1998, the panel denied the Government's petition for rehearing.[3] App. 32. On the same date, the Circuit denied the suggestion for rehearing *en banc*. App. 33. As noted previously, Judge Wald (not a member of the panel deciding this case) issued an opinion concurring in the denial of the suggestion for rehearing *en banc* precisely to highlight the circuit split and the need for Supreme Court review:

> I find the interpretation of 18 U.S.C. 201(c)(1) (A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention.

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[3] The Government cited in its petition for rehearing this Court's decision in *Standefer v. United States*, 447 U.S. 10 (1980) as supporting the Government's interpretation of 18 U.S.C. § 201(c)(1)(A). Although the panel denied the petition without opinion, it subsequently responded to the Government's reliance on *Standefer* by adding new footnote #5 to its original opinion at 138 F.3d 961. That footnote is addressed in Part II of this Petition.

App. 34 (internal citations omitted). According to Judge Wald,

> [t]he ephemeral distinction between bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's 'position,' rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the 'snicker test' with laymen.

Id. Judge Wald then candidly "admit[ted] that the main distinction the panel draws between gifts motivated by an official's 'position' and gifts motivated by an official's 'acts' eludes me altogether," *id.*, concluding instead that "inherent in an official's 'position' is his capacity to perform regulatory acts which will affect the gift-giver." *Id.*

REASONS FOR GRANTING THE WRIT

I. The District Of Columbia Circuit's Interpretation Of 18 U.S.C. § 201(c)(1)(A), A Statute That Prohibits The Giving Of Unlawful Gratuities To Federal Officials, Creates An Acknowledged And Irreconcilable Split Of Authority In The Federal Courts Of Appeal

The District of Columbia Circuit rejected the interpretation of the unlawful gratuity statute that prevails in the Circuits, that the statute prohibits gratuities paid to federal officials who are in a position to take official action that could benefit the giver. Instead, the D.C. Circuit requires something more — specifically, proof that ties the gratuity to past or future official acts of the federal official. In other words, the D.C. Circuit rejected an interpretation of the statute that would prohibit the giving of gratuities to gain the generalized goodwill of a federal official before whom the gift giver had matters pending. *See* App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized

sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury found that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future"). Although the Court insisted that it was not requiring the Government to prove a nexus between a specific official act and the gratuity, it is not clear how else, under the standard the Court adopted, the Government can prove that a gratuity was unlawful under § 201(c)(1)(A).

As the D.C. Circuit expressly acknowledged, its restrictive view of the statute's scope creates an irreconcilable split of authority in the federal courts of appeal. App. 11-12. This conflict pits the D.C. Circuit — the seat of the federal government — against several other circuits, including at least the Second, Third, Fifth and Ninth Circuits. In fact, it appears that in most circuits other than the District of Columbia, Sun-Diamond's § 201(c)(1)(A) unlawful gratuity conviction in this case would be sustained. Astonishing as it may seem, the D.C. Circuit's decision in this case means that a gratuity that would be a federal crime if given to a minor federal official in the Second, Third, Fifth or Ninth Circuits might be considered perfectly legal if given to a Cabinet Secretary in Washington, D.C. In light of the extreme public importance of the gratuity statute in maintaining governmental integrity and the sharp split of authority in the circuits, this case warrants the Court's immediate attention.

A. The D.C. Circuit's Decision In This Case Creates A Significant Split Of Authority On An Important Issue Of Federal Law

1. The D.C. Circuit candidly acknowledged that its interpretation of § 201(c)(1)(A) creates a significant circuit split on the scope of the unlawful gratuity statute. App. 11-12; *see also* App. 34 (Wald, J., concurring in the denial of suggestion for rehearing *en banc*) ("The current circuit split calls for Supreme Court attention"). Indeed, the D.C. Circuit itself pointed to decisions from four other circuits that conflict

with its decision in this case. *See* App. 11. The D.C. Circuit flatly rejected the interpretations of § 201(c)(1)(A) that those and other circuits have expressly adopted.[4] Relying on the "for or because of any official act performed or to be performed" language of the statute, the D.C. Circuit simply observed that:

> These decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says "Generally, no proof of a *quid pro quo* is required: it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*.

App. 11-12 (internal citation omitted).

2. Even a brief review of § 201 unlawful gratuity decisions from other circuits confirms that the D.C. Circuit's decision in this case distances it from the prevailing interpretation. Some circuits have adopted the interpretation of the statute that the district court in this case endorsed: that the statute applies if the giver of the gratuity has matters "within the purview of the official receiving the gratuity" and the gratuity was given because of the official's position. *See* App. 42. These decisions recognize, as Judge Wald did in this case, *see* App. 34, the

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[4] *See, e.g., United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966); *United States v. Barash*, 412 F.2d 26, 29 (2d Cir. 1969); *United States v. Niederberger*, 580 F.2d 63, 68-69 (3d Cir. 1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) *(en banc), afield*, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976). All of these decisions are discussed below.

realities of the motivations of a regulated entity bestowing favors on its regulator.

For instance, in *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit rejected any attempt to impose a requirement that the Government prove a nexus between a gratuity and particular official acts.[5] The defendant in *Niederberger* was an Internal Revenue Service ("IRS") agent who was prosecuted for accepting free golf trips from an official of a company the IRS agent was responsible for auditing. The defendant argued that the Government was required to prove that he accepted the gratuities in exchange for specific official acts, but the Third Circuit rejected that proposition in no uncertain terms:

> Thus, we find it unnecessary for the Government to allege in an indictment charging [an unlawful gratuity] offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A *quid pro quo* is simply foreign to the elements of a [gratuity] offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, *and he was in a position to use his authority in a manner which could affect the gift-giver.*

580 F.2d at 68-69 (emphasis added).

In *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976), the Ninth Circuit endorsed a reading of § 201 that

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[5] Several of the older unlawful gratuity cases refer to §§ 201(f) and (g), which were the predecessors to the current § 201(c). Section 201(f) prohibited the giving of unlawful gratuities, while § 201(g) prohibited the receipt of such gratuities. The operative language of the statutory prohibitions, however, remains substantially unchanged between those original provisions and the current § 201(c).

prohibits the giving of gratuities to a federal official who the defendant knows is in a position to use that authority to benefit the giver, even if there is no proof of specific — or indeed any — such acts actually ever performed. The defendant in *Alessio* paid vacation expenses of the administrator of a federal prison camp in which the defendant's father was incarcerated. The defendant argued that the Government had failed to prove that such gratuities were linked to any official acts of the camp administrator, but the Ninth Circuit held that no such proof was required. Instead, the court upheld the conviction because the "jury could properly conclude from the testimony at trial that [the defendant] knew [the camp administrator] was *in a position to use his authority* in a manner which would affect the conditions of confinement of [the defendant's] father." 528 F.2d at 1082 (emphasis added). *See also United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978) (affirming bribery conviction of Customs Service official who accepted $800 to permit person he believed to be carrying illegal drugs to cross Canadian border into U.S., and observing that bribery is different from an unlawful gratuity in that the latter "require[s] only that the thing of value be given or accepted 'otherwise than as provided by law for the proper discharge of official duty'").

Similarly, in *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978), the Fifth Circuit emphasized that it is the giving or acceptance of gratuities because of the official's position that is prohibited by § 201. In *Evans*, the defendant was a bank officer who accepted a position in the Department of Health, Education and Welfare. Prior to even officially starting as a federal employee, he received gratuities from persons who were interested in maintaining business relationships with him and possibly obtaining certain federal government contracts with HEW. The defendant argued that the Government had failed to prove that the gratuities were tied to any specific acts and, moreover, that at the time he received them (and afterward) he lacked the authority to perform some official act to benefit the givers.

In affirming his unlawful gratuity convictions, the Fifth Circuit observed that the statute prohibits

> the acceptance by a government official of any extraneous compensation or thing of value for official conduct. More specifically, it is not necessary that the official actually engage in identifiable conduct or misconduct nor that any specific *quid pro quo* be contemplated by the parties nor even that the official actually be capable of providing some official act as *quid pro quo* at the time.

572 F.2d at 479. Rather, the Fifth Circuit emphasized that

> [e]ven if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs.

Id. at 480. After reviewing the statute's language and purposes, and considering some of its legislative history, the Fifth Circuit concluded that under the unlawful gratuity subsection "all that need be proven is that the official accepted, *because of his position*, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" *Id.* (emphasis added).

Similar to these Circuits, the Sixth Circuit has held that the

> purpose of Section 201(g) [receipt of unlawful gratuities] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position.

United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986) (citing *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978)). In *Gorman*, the primary issue was whether certain loans an Assistant United States Attorney had received (and later

repaid) were "things of value" under § 201. The defendant argued that the loans were not "gratuities" in a conventional sense, but the Sixth Circuit flatly rejected the argument, observing that "[c]ontrary to the appellant's argument, there is no authority for the proposition that the items received must be 'gratuities' as that term is commonly understood." 807 F.2d at 1304. Instead, the Sixth Circuit concluded that, "[i]n order to put the underlying policy of the statute into effect," terms such as "'thing of value' must be broadly construed." *Id.*

The Second Circuit also has interpreted the statute similarly to the Circuits previously discussed. For example, in *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), a certified public accountant made surreptitious cash payments to IRS agents who were auditing the income tax returns of the accountant's clients. The accountant was prosecuted for and convicted of numerous federal crimes, including bribery and giving unlawful gratuities under § 201. On appeal, the Second Circuit affirmed all of the convictions except the unlawful gratuity counts, finding that they were lesser included offenses of the bribery counts. The court declared that the unlawful gratuity statute "only requires proof that payment was made to an agent in a situation where no payment was necessary." 368 F.2d at 728. The Second Circuit further declared that the unlawful gratuity statute "makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment." *Id.* at 730. *See also United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965) (to sustain an unlawful gratuity conviction, the Government must prove the defendant gave the gratuity "knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons"); *United States v. Barash*, 412 F.2d 26 (2d Cir. 1969) (affirming § 201 unlawful gratuity conviction of tax attorney who paid IRS auditors, and noting that it made no difference "whether the payments were made because of economic duress, a desire to create a better working atmosphere, or [in] appreciation for a speedy and

favorable audit"); *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988) (affirming § 201 unlawful gratuity convictions of former Congressman; citing and quoting *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) with approval).

3. Some decisions appear to go even further, upholding § 201(c)(1)(A) convictions upon proof that the giver of the gratuity was motivated simply by the federal official's *status* or *position*. For example, soon after its decision in *United States v. Niederberger*, discussed above, in considering the prosecution and conviction of the company official (Standefer) who gave the golf trips to the IRS agent (Niederberger), the Third Circuit *en banc* held that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes." *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979)(*en banc*). That decision, which this Court affirmed, *Standefer v. United States*, 447 U.S. 10 (1980), is the subject of the second section of this petition.

More recently, the Fifth Circuit arguably extended its holding in *Evans* to permit § 201(c)(1)(A) to reach the giving of any gratuity motivated solely by the official's *status* or *position*, without requiring proof that the official had been, is, will or could ever be in a position to take official action that might benefit the giver. In *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995), the Fifth Circuit affirmed the § 201 unlawful gratuity convictions of a former Congressman who accepted loan guarantees from a private person in connection with his participation in an effort to seek a television station license from the Federal Communications Commission. There was no evidence that the defendant in any way actually engaged in any conduct designed to influence the awarding of the license, nor that he had any authority to do so.

The Fifth Circuit upheld the convictions, relying on *Evans*. The court reiterated that, in order to establish an unlawful gratuity offense under § 201, "it is sufficient for the

government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Furthermore, the court declared that "the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation." *Id*. The defendant in *Bustamante* filed a petition for a writ of certiorari, which this Court denied. *Bustamante v. United States*, No. 95-60, 516 U.S. 973 (1995).

4. Other Circuits, including the First and Fourth Circuits, which the D.C. Circuit cited as supporting its interpretation of the statute, either have expressly left the issue undecided, or appear not to have considered it directly. For example, in *United States v. Previtte*, 648 F.2d 73 (1st Cir. 1981), the First Circuit addressed and rejected a challenge to an unlawful gratuity conviction under § 201, finding that there was no plain error in the jury instructions (the defendant did not object at trial). In response to the defendant's argument that the government had failed to prove that the gratuity was given for or because of an official act, the First Circuit observed:

> The government points out that it is not required to prove that any such official act actually occurred, and argues in addition that in a gratuity prosecution, unlike a bribery prosecution, it need prove no causal relation to any "specific, identifiable act performed or to be performed by the official." We need not decide whether this last point is correct or not, because of our conclusion that the instruction given in this case does not constitute plain error under either standard.

648 F.2d at 82 n.8. The First Circuit more recently noted the issue again in a case involving a Massachusetts unlawful gratuity statute worded similarly to § 201, but concluded that "[t]his is not the proper case for us to decide the federal issue." *United States v. Sawyer*, 85 F.3d 713, 738 (1st Cir.

1996). *See also United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (no occasion to directly address the issue because the defendant had been convicted of bribery as well as unlawful gratuity offense and *conceded* that evidence was sufficient to prove gratuity offense).

Some Circuits have made general, but relatively unilluminating, statements about the scope of § 201(c)(1)(A) in cases where the question presented here was not directly under consideration. For example, in *United States v. Patel*, 32 F.3d 340 (8th Cir. 1994), the Eighth Circuit affirmed the unlawful gratuity conviction of a defendant who offered $50,000 to federal officials during his efforts to buy a hotel from the Resolution Trust Corporation. (Defendant's plans went awry when the official receiving the offer reported it to the FBI.). The district court instructed the jury that, in order to find the defendant guilty under § 201(c)(1)(A), the following three things had to be proven: (1) that the defendant offered something of value to the federal official; (2) that at the time the donee was a federal official; and (3) that the defendant made the offer because the official performed or was going to perform an official act for him. 32 F.3d at 344-45. Reviewing the instructions only for plain error — because the defendant did not properly object at trial — the Eighth Circuit concluded that they closely paralleled the statute's language and fell "well within the district court's discretion to choose the language that will formulate the charge." *Id.* at 345. *See also United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (it is the "element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple *mens rea* required for violation of the gratuity sections").

5. Ultimately, there is no dispute that the D.C. Circuit, probably the most important circuit for the enforcement of the unlawful gratuity prohibition, has interpreted the statute differently and more leniently than virtually every other circuit. Nor is there any dispute that Sun-Diamond's

conviction under § 201(c)(1)(A) in this case would be sustained in at least five, if not all, of the other circuits. At a minimum, the jury instructions in this case required, the Government in this case proved, and the jury in this case found, that Sun-Diamond (1) provided gratuities to Secretary Espy while matters of interest to Sun-Diamond were pending before the Secretary, and (2) did so because of Espy's position and authority as the Secretary of Agriculture. By virtue of the circuit split alone, this case merits plenary review.

B. The D.C. Circuit's Decision Seriously Undermines The Enforcement Of An Important Federal Criminal Statute Designed To Promote Government Integrity

1. At issue ultimately in this case is whether a large agricultural cooperative, regulated by the federal government, may lavish gifts upon the Secretary of Agriculture and yet escape prosecution under the unlawful gratuities statute. The D.C. Circuit's decision permits such conduct unless the Government is able to prove the virtual equivalent of a bribe. A construction of the statute that eliminates the distinction between bribes and unlawful gratuities is contrary to the significantly different language of the two statutes,[6] Congress' clear intent to create two separate offenses,[7] and the

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[6] *See, e.g.*, Department of Justice, *United States Attorneys Manual* § 9-85.101 (Sept. 1997) ("Section 201 of Title 18 is entitled 'Bribery of public officials and witnesses.' The statute comprises two distinct offenses, however, in common parlance only the first, codified in section 201(b) of the statute is true 'bribery.' The second offense, codified in section 201(c), concerns what are commonly known as 'gratuities,' although that word does not appear anywhere in the statute.").

[7] *See, e.g., Note, Campaign Contributions And Federal Bribery Law*, 92 Harv. L. Rev. 451, 451 (1978) ("The federal bribery statute specifies two offenses that may be committed by public officials who receive contributions: bribery and gratuity"); *id.* ("The statutory definition of the gratuity offense . . . does not expressly require proof of corrupt intent or proof that value was given specifically in return for performance by the

longstanding judicial interpretation of § 201 as creating two separate offenses.[8] Moreover, the D.C. Circuit's interpretation presents a serious obstacle to the federal prosecution of official corruption and the restoration of public confidence in governmental integrity.[9]

Effectively, the D.C. Circuit held that, unless the United States proves that a defendant gave gratuities to a government official either to reward that official for specific past official acts, or with the intent to increase the likelihood of future acts, there can be no conviction under § 201(c)(1)(A), because there would be no proof that the defendant acted "for or because of any official act performed or to be performed." App. 7. The Circuit rejected the interpretation of the other circuits that a violation of the statute is established by proof that the gratuity was given to an official who was in a position to take official actions that could benefit the giver.

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official"); Daniel H. Lowenstein, *Political Bribery And The Intermediate Theory Of Politics*, 32 U.C.L.A. L. Rev. 784, 796 (1985) ("the elements of bribery should be contrasted with those of a lesser offense that exists in federal law and in some states: giving or receiving an unlawful gratuity"); Joseph R. Weeks, *Bribes, Gratuities and the Congress: The Institutionalized Corruption Of The Political Process, The Impotence Of Criminal Law To Reach It, And A Proposal For Change*, 13 J. Legis. 123, 127 (1986) (observing that 18 U.S.C. § 201 prohibits both bribes and unlawful gratuities); *id.* at 132 (chart contrasting elements of the two offenses); Charles N. Whitaker, Note, *Federal Prosecution Of State And Local Bribery: Inappropriate Tools And The Need For A Structured Approach*, 78 Va. L. Rev. 1617, 1621-22 (1992) (discussing the difference between bribery and unlawful gratuity offenses under federal law).

[8] *See United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); Note, 92 Harv. L. Rev., supra note 7, at 456 n.29 (since at least 1965, the federal courts have recognized two separate offenses under § 201).

[9] *See, e.g.*, Weeks, 13 J. Legis., *supra* note 7, at 136-38 (criticizing the D.C. Circuit's judicial imposition of a requirement of proof of a nexus between a gratuity and specific official act, arguing that such a construction is not supported by § 201's text, legislative history, or purpose, and that the D.C. Circuit's interpretation generally has frustrated "what should be routine convictions for corruption." *Id.* at 137).

2. The D.C. Circuit's decision in this case has potentially disastrous practical consequences. In many instances, it may make an unlawful gratuity under § 201(c)(1)(A) virtually indistinguishable from a bribe, a considerably more serious offense that is already covered by a separate statutory provision with far stiffer penalties (up to 15 years imprisonment for bribery, compared to a maximum of 2 years for unlawful gratuities). The House Report that accompanied the original § 201 provisions in 1961 clearly indicates that Congress contemplated the offense of giving or receiving an unlawful gratuity to be something less than a bribe. In describing the unlawful gratuity offense, the Report declares that "[t]he conduct which is forbidden has the *appearance* of evil and the capacity of serving as a cover for evil." H.R. Rep. No. 748, at 19 (July 20, 1961) (emphasis added).

Under the D.C. Circuit's decision, however, when a gratuity is given in anticipation of future official action, an unlawful gratuity conviction will be sustained only if the Government proves that the defendant acted with the intent to increase the likelihood of an official act. As a practical matter, it is difficult to see how the D.C. Circuit's view of an unlawful gratuity is really any different than proof that the giver had the intent to influence an official act, which is an element of bribery. Because no other circuit requires proof of this level of criminal intent, the D.C. Circuit's decision has the undesirable result that the most restricted and limited enforcement of the unlawful gratuity statute in this country will occur in the District of Columbia, our nation's capital.[10] The end result is that it may be easier for regulated entities to bestow largesse on Cabinet Secretaries without fear of criminal prosecution than it would be to provide small gifts to

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[10] "Ethics experts have characterized the lower court case [*United States v. Sun-Diamond Growers of California*] as one of the most important corruption verdicts in recent history." Federal Ethics Report, at 9 (May, 1998).

minor officials far down a Department's hierarchy who are located in a different circuit.[11] Another irony is that Cabinet Secretaries, who deal with issues of national scope and regularly travel across the country in performing their official duties, as well as those regulated entities that might provide favors to such officials, may be subject to different standards for gratuities, depending on where a gratuity is given or received. The rules governing the conduct of Cabinet Secretaries and other federal officials should be uniform, and not an accident of venue.

II. The D.C. Circuit's Decision Is Arguably Inconsistent With A Prior Decision Of This Court

1. In *Standefer v. United States*, 447 U.S. 10 (1980), this Court arguably endorsed a broader interpretation of § 201 than the D.C. Circuit adopted in this case.[12] Among other charges, Standefer was convicted of four counts of violating § 201's unlawful gratuity prohibition by providing free golf trips to an IRS agent who was auditing Standefer's company.

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[11] These sorts of incongruities were part of what Congress intended to eliminate when it overhauled the federal bribery and conflict of interest statutes by creating § 201 in the early 1960s. In the same House Report concerning § 201 discussed above, the House Committee on the Judiciary, while addressing reasons for a new comprehensive conflict of interest law, observed that "[l]iterally read, existing law thus makes it a crime punishable by fine and imprisonment for a postal clerk to assist his mother in filing a routine claim for a tax refund, but does not prohibit a Cabinet officer from seeking to influence an independent agency to award a license for a valuable television station to do a business venture in which he shared the profits." H.R. Rep. No. 748, 87th Cong., 1st Sess., at 4 (July 20, 1961).

[12] As pointed out in footnote 5 above, at the time *Standefer* was decided, the unlawful gratuity prohibitions were contained in § 201(f) (prohibiting the *giving* of such gratuities) and § 201(g) (prohibiting the *receipt* of such gratuities). Thus, although the opinions and briefs in *Standefer* refer to § 201(f), they are addressing the same provision and language at issue in this case.

Standefer's defenses included that the gifts in fact had no influence on the outcome of the audits and that he gave the trips out of friendship, with no intent to influence or reward any official acts of the IRS agent. Both initially, and in response to a question from the jury regarding criminal intent under § 201, the District Court instructed the jury that a conviction could be sustained if it found that Standefer gave the trips because of the IRS agent's official position, and not simply out of friendship.

On appeal, Standefer challenged the jury instructions on several grounds, including some similar to the position the D.C. Circuit adopted in *Sun-Diamond*, *i.e.*, that the instructions permitted a conviction without proof that Standefer gave the gratuities as a reward for or to influence official acts. The Third Circuit, sitting *en banc*, rejected Standefer's argument, declaring that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the IRS agent's] official position, and not solely for reasons of friendship or social purposes." *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (*en banc*).

2. In this Court, Standefer petitioned for review of several issues, including that the Third Circuit's decision incorrectly "allow[ed] the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations." Petition for a Writ of Certiorari in No. 79-383, *Standefer v. United States*, at 3-4.[13]

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[13] This petition cites the petition for certiorari, merits briefs, and appendix filed in this Court in *Standefer v. United States*, 447 U.S. 10 (1980). These documents are available through LEXIS, but LEXIS does not assign electronic database citations to them. The documents can be located through a search in the LEXIS "Genfed" library, "Briefs" file, using the search "Number (79-383)".

In the petition, Standefer also argued that the question was "whether Standefer had a corrupt intent in providing the golf trips or if the golf trips were provided for business friendship." *Id.* at 20. This Court granted certiorari on all issues presented in Standefer's petition. 444 U.S. 1011 (1980).

In their briefs on the merits, both Standefer and the United States addressed the proper interpretation of § 201. In his opening merits brief, Standefer argued that the District Court's § 201 instructions were erroneous because they stated that the IRS agent's

> position as an IRS agent in charge of the Gulf Oil audits made him a person whose actions were official acts under the statute and took away from the consideration of the jury the issue of corrupt intention. The charge that it was sufficient if the payments were paid for any reason in connection with the audits was tantamount to a directed verdict of guilty and did not consider the defense that the golf trips were taken for friendship and were not within the purview of the meaning of the criminal statutes.

Br. of Pet., No. 79-383, *Standefer v. United States*, at 42. The United States responded that the jury instructions were correct because § 201 is "designed to prevent officials from being tempted by unauthorized compensation--even if in particular circumstances the temptation is resisted." Br. of U.S., No. 79-383, *Standefer v. U.S.*, at 60.

In a section of his reply brief entitled, "IV. LEGISLATIVE HISTORY OF 18 U.S.C. § 201(f) RE INTENT", Standefer addressed the legislative history of § 201, and argued that the "for or because of" official acts language in the statute's unlawful gratuity provision "was aimed at rewards for an official act," not the mere "receipt of gifts." Rep. Br. of Pet., No. 79-383, *Standefer v. United States*, at 9-11. Standefer then relied on the D.C. Circuit's

decision in *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), arguing that *Brewster* correctly interpreted § 201 to require proof of the gratuity "'being made because of a specifically identified act, and with a certain guilty knowledge . . . .'" Rep. Br. at 11-13 (quoting from *Brewster*). Although his briefs are not completely clear on these points, and Standefer appears to have been raising multiple, intermingled arguments regarding the intent required for a § 201 conviction, the essence of Standefer's position in this Court appears to have been that the District Court's jury instructions were erroneous because they neither required proof of any particular official act that Standefer intended to reward or influence, nor that he had "corrupt intent" in providing golf trips to the IRS agent.

In its opinion, this Court gave short shrift to Standefer's arguments regarding the proper interpretation of § 201. The Court expressly affirmed the Third Circuit's decision in a footnote, declaring that "Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct." *United States v. Standefer*, 447 U.S. 10, 14 n.8 (1980). This Court's decision regarding the jury instructions, although limited to a two-sentence footnote, was a holding, not dicta.

3. On June 18, 1998, the D.C. Circuit denied the United States' petition for rehearing in this case without an opinion and without commenting on this Court's decision in *Standefer*. App. 32. At or about the same time, however, the panel, without notice to the parties, apparently amended its original opinion in this case by instructing West Publishing to add a new footnote addressing *Standefer*. The new footnote, footnote 5 in the bound volume containing the opinion (138 F.3d 961), dismisses *Standefer* for two reasons. First, the D.C. Circuit opined that the only § 201 issue in *Standefer* was whether the Government is required to prove a *quid pro quo* in an unlawful gratuities case. App. 11 n.5. Second, the Circuit further opined, without explanation, that the jury

instructions in *Standefer* "were far narrower than the charge in this case." *Id.* Neither proposition is correct.

As set forth above, Standefer's arguments regarding the intent required under § 201 to sustain an unlawful gratuity conviction included, but were by no means limited to, a *quid pro quo* requirement. He also argued that he gave the IRS auditor the golf trips solely out of friendship, and not for any improper purpose. This is the theory of the case to which the Third Circuit was responding when it observed that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the IRS agent's] official position, and not solely for reasons of friendship or social purposes." 610 F.2d at 1080. Moreover, in this respect, several of the jury instructions given in *Standefer* were comparable to the instructions given in this case. For example, the jury in *Standefer* was instructed

> [I]t is sufficient if these payments were paid for any reason in connection with the audit, because of a desire to create a better working atmosphere, or appreciation for a speedy or favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case. But it has to be for the purpose of giving these things to the agent on account of these returns and his position with respect thereto.

Appendix, No. 79-383, *Standefer v. United States*, at 50. Thus, *Standefer* is not irrelevant to this case, although additional guidance from this Court with respect to the meaning of § 201(c)(1)(A) is sorely needed at this time.

CONCLUSION

The D.C. Circuit's decision in this case creates a significant and acknowledged circuit split on the interpretation of an important federal criminal statute, and arguably is contrary to a decision of this Court. The unfortunate result of the D.C. Circuit's decision is that the law in the District of Columbia, our

nation's capital, is significantly more tolerant of gratuities given to federal officials, including Cabinet Secretaries, than in virtually any other circuit in the country. The United States suggests that this Court should grant plenary review of this case to resolve the circuit split regarding the interpretation of this important statute. The ability of the United States to prosecute the giving and receipt of unlawful gratuities to federal officials is an interest of the highest order.

For the foregoing reasons, the United States respectfully requests that the Court grant certiorari in this case to resolve the circuit conflict and establish the proper interpretation of 18 U.S.C. § 201(c)(1)(A), an important criminal statute that prohibits the giving of unlawful gratuities to federal officials.

Respectfully submitted,

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July 1998

APPENDIX A

UNITED STATES OF AMERICA, Appellee,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA, Appellant.

NO. 97-3072.

United States Court of Appeals,
District of Columbia Circuit.

ARGUED DEC. 11, 1997.

DECIDED MARCH 20, 1998.

Appeal from the United States District Court for the District of Columbia (No. 96cr00193-01).

Eric W. Bloom, Washington, DC, argued the cause for appellant. With him on the briefs were Richard A. Hibey, Michael K. Atkinson and Charles B. Klein.

Theodore S. Greenberg, Deputy Independent Counsel, Alexandria, VA, argued the cause for appellee. With him on the briefs were Donald C. Smaltz, Independent Counsel, Los Angeles, CA, and Charles M. Kagay, Chief Appellate Counsel, San Francisco, CA.

Carter G. Phillips and Griffith L. Green, Washington, DC, were on the brief for amicus curiae American League of Lobbyists.

Before: WILLIAMS, HENDERSON and TATEL, Circuit Judges.

STEPHEN F. WILLIAMS, Circuit Judge:

Sun-Diamond is a large agricultural cooperative owned by individual member-cooperatives including Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet

Growers, Valley Fig Growers, and Hazelnut Growers of Oregon. It came within the sights of an independent counsel, Donald C. Smaltz, who was responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Mike Espy. The independent counsel charged Sun-Diamond with making illegal gifts to Espy, committing wire fraud, and making illegal campaign contributions.

Linking Sun-Diamond and Espy was the figure of Richard Douglas. As Sun-Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun-Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun-Diamond's president, Douglas was a diligent and able representative. He once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Mike Espy-- the two had gone to college together at Howard University and had stayed close in the years since.

The crimes charged to Sun-Diamond grow out of two largely independent stories. One involves illegal gratuities given to Espy while he was Secretary of Agriculture, the other wire fraud and illegal contributions to the congressional campaign of the Secretary's brother, Henry Espy. We save the recitation of facts for the discussion of the distinct legal issues raised by each story.

Sun-Diamond argues that under the facts alleged and proven it could not properly be found guilty of any of the offenses, and, as to the illegal gratuities, that the trial court's charge allowed the jury to convict on a theory precluded by the statute. We disagree with Sun-Diamond's claims of entitlement to dismissal of the indictment and to acquittal, but we agree that the jury charge on the gratuity counts was error and requires a remand for a new trial. Sun-Diamond also

attacks the sentence, saying that the trial judge, having increased the offense level by eight for Espy's high-level status as required by the Guidelines, wrongly bumped it up another two levels on the theory that the Guidelines inadequately took that status into account. It also objects to the trial court's imposition of probationary conditions on Sun-Diamond's member cooperatives, who were neither defendants nor agents of the defendant. We agree with Sun-Diamond on both sentencing points.

* * *

Illegal Gratuities

The key dispute here is over how close a link the government must show between Sun-Diamond's gifts and official acts that the Secretary of Agriculture performed or might perform. The indictment detailed two specific issues on which Sun-Diamond had a clear interest in favorable action by the Secretary. The first was the market promotion program ("MPP"), a grant fund administered by USDA and designed to prop up U.S. agricultural exports. See 7 U.S.C. §5623. The Secretary of Agriculture was authorized to allocate MPP money to trade organizations like Sun-Diamond, who would in turn use it to defray overseas marketing expenses. According to the independent counsel, between 1990 and 1995 the Sun-Diamond member cooperatives received $23.9 million from MPP. In August 1993 Congress enacted budget legislation requiring the Secretary to give preference to "small-sized entities" in disbursing MPP funds. Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, ' 1302(b)(2)(A), 107 Stat. 312, 331 (1993). Sun-Diamond and its members were hardly mom-and-pop organizations--they reported net sales of $648 million for fiscal year 1993--but many of their constituent growers were quite modest in size. Sun-Diamond therefore wanted the Secretary to adopt a regulatory definition of "small-sized entities" that would include cooperatives such as its members.

Sun-Diamond also took an interest in federal regulation of methyl bromide, a pesticide used by some of the growers who belonged to its member cooperatives. In late 1992 the Environmental Protection Agency began review of a proposal to phase out the use of the chemical in the United States because of its potential to contribute to ozone depletion. Although the methyl bromide issue was not technically before USDA, a rational jury could conclude from the trial evidence that Sun-Diamond wanted Espy to help persuade EPA to delay or reject the proposed phase-out.

Count I of the indictment charged the company with giving Espy (via Douglas) around $5,900 in illegal gratuities: tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524.[1] The indictment further alleged that Sun-Diamond reimbursed Douglas for these outlays, treating them as business expenses.

Sun-Diamond challenges Count I, asserting that the gratuity statute, 18 U.S.C. § 201(c)(1)(A), requires the government to prove a nexus between each unauthorized gift and some specifically identified official act--performed or hoped to be performed--for which the gift was given. Because the indictment failed to allege any such one-to-one relationship, contends Sun-Diamond, the district court erred in denying its motion to dismiss Count I. See *United States v. Sun-Diamond Growers of California*, 941 F.Supp. 1262 (D.D.C.1996) (denying motion to dismiss); *United States v. Sun-Diamond Growers of California*, 964 F.Supp. 486 (D.D.C.1997) (denying renewed motion for acquittal). In a narrower variation on this argument, Sun-Diamond also challenges the jury instructions, saying that they impermissibly allowed the jury to convict if it found that Sun-Diamond gave Secretary Espy things of value merely in

[1] Count II charged Sun-Diamond with paying $3,100 for Espy's girlfriend to accompany him to the International Nut Conference in Athens. The jury acquitted on this count.

recognition of his official position, regardless of official acts that might have supplied the motivation. We reject Sun-Diamond's broader argument but agree with its challenge to the jury instructions, and it is with that challenge that we begin.

The gratuity statute provides:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1)(A) (emphasis added).

The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The trial court charged the jury in full accord with the independent counsel's theory that gifts motivated by an official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or reward official conduct. Indeed, time and again the jury instructions hammered home that theme:

> The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value *because of his official position* whether or not the giver or receiver intended that particular official's acts be influenced.

* * *

The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*

* * *

It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*

* * *

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.

* * *

[T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and knowingly and willingly gave the gratuities, at least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. The*

government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.

(Emphases added.)

The language of the charge is far broader than that of the statute. To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts. This is the meaning we found in our most extensive sdiscussion of the gratuity statute, *United States v. Brewster*, 506 F.2d 62 (D.C.Cir.1974). In addressing the claim that a violation of the gratuity statute is a lesser included offense subsumed within a violation of the bribery statute, now codified at § 201(b)(1)(A),[2] we necessarily compared the two provisions, explaining that the bribery provision required a more exacting showing of intent. *Id.* at 71-74. We characterized one aspect of the difference as follows:

> The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or

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[2] Section 201(b)(1)(A) imposes criminal penalties upon:

> Whoever . . . directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent . . . to influence any official act.

Because *Brewster* involved the acceptance rather than the giving of gratuities and bribes, the court in fact focused on 18 U.S.C. § 201(c)(1) (1969) (covering receipt of bribes, now codified with minor differences in language at § 201(b)(2)(A)), and 18 U.S.C. § 201(g) (1969) (covering receipt of gratuities, now codified with minor differences in language at § 201(c)(1)(B)). The elements of the offense at issue here are the same, however, regardless of whether the defendant is the donor or donee, so *Brewster* stands as a controlling precedent for our case.

> producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, *although the gratuity was produced because of the official act.*

Id. at 72 (emphasis added). As this passage makes tolerably clear, to say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. But the gratuity statute by its terms does still require at least a unidirectional relationship--the gift must be "for or because of" the act.

The relation may be simply one of reward. "As the word 'gratuity' implies, the intent most often associated with the offense is the intent to 'reward' an official for an act taken in the past or to be taken in the future." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir.1996) (construing virtually identical Massachusetts gratuity statute). Even in such a case, the giver presumably hopes that his gratuity will affect the recipient's future conduct--and this was undoubtedly the concern that motivated Congress to bring rewards for past acts within the coverage of the statute. But, in contrast to bribery, it is enough under the gratuity statute if the defendant gives an unpromised benefit for a past governmental favor. And, whatever degree of intent to influence may be necessary for a bribe, a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts. In summary, as we explained in *Brewster*, "under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act.*" 506 F.2d at 82 (emphasis added).

The independent counsel appears to accept this analysis of *Brewster*, but claims that in that decision we restricted application of the official act requirement to cases involving

elected officials or candidates for elective office. Indeed, Brewster was a senator, and we noted that in cases involving elected officials the official act requirement served the important function of distinguishing illegal gratuities from ordinary campaign contributions. See *id.* at 73 n. 26, 81. But in a footnote we postponed the question of non-elected officials to another day, distinguishing and declining to express ultimate disagreement with *United States v. Umans*, 368 F.2d 725 (2d Cir.1966), a decision that dispensed altogether with the intent requirement in a case involving gratuities offered to I.R.S. agents. *Brewster*, 506 at 73 n. 26.

Even assuming the footnote could be read as suggesting a readiness to jettison the intent requirement in cases involving appointed officials, we disappointed any such expectation eight years later by reaffirming the official act requirement in *United States v. Campbell*, 684 F.2d 141 (D.C.Cir.1982). *Campbell* concerned a Superior Court judge who received free moving services from a trucking firm that he had treated remarkably lightly, issuing nominal or suspended sentences on over 1,000 traffic tickets. We approved a jury charge requiring "that the alleged gratuities be given and received 'knowingly and willingly,' and '*for or because of an official act.*'" *Id.* at 150 (emphasis added). To be sure, the attack in *Campbell* came from the defendants, who claimed a right to an even more restrictive charge. But *Campbell* cannot possibly be said to have stripped the statute of its "for or because of" requirement.

A detail from that case underscores how we have refused to allow the official act requirement to be satisfied by some vague hope of inducing warm feelings toward the donor. Campbell had served as Assistant Corporation Counsel for the District of Columbia before becoming a judge in 1973, and was reputed to have been "sympathetic to trucking interests" during that time. *Id.* at 149 n.13. Yet, responding to a somewhat unclear claim that the jury might have convicted for uncharged prior acts, we noted that "[i]t is not even clear which 'acts' of Robert Campbell could have been the basis for

[the trucking company's] gratuities prior to 1973, because 'sympathy to trucking interests' does not constitute an official act." *Id.* at 149 n.14.[3] Here, too, if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future.

At oral argument we questioned the representative of the independent counsel on the application of his theory to instances where an old friend of some newly appointed officeholder took him to a meal or sports event while his firm had matters pending before the officeholder. Counsel appeared to assert that this scenario fell within his view of the statute.[4] Indeed, it would have been squarely within the

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[3] The independent counsel claims that these passages in *Campbell* turn on the notion that an Assistant Corporation Counsel is not in a position to perform official acts. The notion is false--under District law an Assistant Corporation Counsel may, for example, choose to prosecute (or not prosecute) traffic violations, D.C.Code §§ 23-101, 40-622. Perhaps because of its falsity, the notion is never mentioned by the *Campbell* court. Had the government charged Campbell with a pre-1973 decision not to prosecute the trucking company, rather than alleging mere "sympathy," such a decision might well have constituted an official act sufficient to support a gratuity charge.

[4] The colloquy at oral argument was as follows:

> THE COURT: So if an old friend of mine from law school who's a partner in a firm that has a pending case before this Court takes me to a baseball game, as we've done for years, that's an illegal gratuity?
>
> COUNSEL: It may well be, yes.
>
> THE COURT: You're serious?
>
> COUNSEL: If you have a case, if [counsel for Sun-Diamond] takes you to the game tomorrow, takes you to the Redskins game on Sunday while you have this case pending before you, that's a gratuity.

district court's charge to the jury. But we trust that, should Congress someday decide to criminalize such conduct, it will *not* require that the gifts be given "for or because of any official act."

The independent counsel points to *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C.1989), as well as several decisions by other courts of appeals apparently holding that gifts motivated solely by the recipient's official position may be illegal gratuities. See *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir.1979) (en banc);[5] *Umans*, 368 F.2d at 730; *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir.1995); cf. *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.1976) (suggesting that donee's ability to use his position for donor's benefit was enough to satisfy the official act requirement). These decisions appear to leap from the

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Oral Arg. Tr. at 30-31. The independent counsel's theory here seems truly sweeping: if this hypothetical baseball arrangement has been in place "for years," stretching back to before the judge's investiture, it is difficult to see how it could be motivated by the judge's position. Even if the baseball invitation represented an increment in the donor's hospitality to his friend since the latter's appointment, under this circuit's reading of the statute it would violate § 201(c)(1)(A) only if offered, as the statute says, "for or because of any official act."

[5] The independent counsel's briefs made no mention of *Standefer*, but in a petition for rehearing he notes that the Supreme Court, in affirming the judgment on others grounds, *Standefer v. United States*, 447 U.S. 10 (1980), said in a footnote that "the instructions to the jury on criminal intent" were "correct." *Id.* at 14 n. 8. Standefer's briefs in the Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir.1979), however, make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8. In any event, the instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says, "Generally, no proof of a *quid pro quo* is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*. Other out-of-circuit cases seem to take the official act requirement more seriously. See, e.g., *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir.1991) ("an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment") (citing *Brewster*); cf. *Sawyer*, 85 F.3d at 735-36 (construing virtually identical Massachusetts gratuity statute).

Finally, the independent counsel asserts that in *United States v. Baird*, 29 F.3d 647 (D.C.Cir.1994), we embraced his broad interpretation of the gratuity statute. The question in *Baird* was whether the conflict of interest statute, 18 U.S.C. § 203(a), requires the government to prove that a defendant knew the statute covered him. We held that the clause "otherwise than as provided by law," which appears both in § 203(a) and in § 201(c) (then codified at §§ 201(f) and (g)), did not embody such a *scienter* requirement; rather, it merely required a showing that the public official received money to which he was not lawfully entitled. *Id.* at 652. Although the *Baird* opinion cited approvingly to both *Evans* and *Standefer*, see *id.*, it did not address directly the "for or because of any official act" language--doubtless because the conflict of interest statute at issue contained no such language.

Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands--evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to

reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

In his effort to salvage the instructions, the independent counsel points to other portions of the charge in which the judge simply repeated the terms of the statute or the indictment verbatim, e.g., by reciting the words "for or because of an official act." These recitations could not possibly, however, have overcome the broader message. Thus the charge failed to give the jury an adequate understanding of the issues, see *United States v. DeFries*, 129 F.3d 1293, 1304 (D.C.Cir.1997), and the error cannot be called technical or harmless, see *United States v. Lemire*, 720 F.2d 1327, 1339 (D.C.Cir.1983). We reverse and remand for a new trial on Count I.[6]

At the same time, we reject Sun-Diamond's broad attack on the indictment. Again *Campbell* controls. Campbell argued, much as Sun-Diamond does here, that the jury should have been required "to find that the gratuity was conferred with 'specific knowledge' of 'a definite official action for which compensation was intended.'" 684 F.2d at 149. We rejected that argument, holding that it was sufficient for the jury to find that the trucking company had provided free services to Campbell because it believed the judge had been, or would later be, "generally lenient" in dealing with the company's voluminous traffic citations. *Id.* at 149-50. The government, we held, was not required to show that any particular free service provided to Campbell was earmarked for any particular ticket or tickets; leniency in a multitude of specific acts was enough. That an official has an abundance of relevant matters on his plate should not insulate him or his

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[6] We reject Sun-Diamond's contention that the gratuity statute is unconstitutionally vague as applied to its conduct. *United States v. Campbell*, 684 F.2d 141, 150 n. 17 (D.C.Cir.1982); cf. *United States v. Brewster*, 506 F.2d 62, 76-78 (D.C.Cir.1974).

benefactors from the gratuity statute--as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely.

The Fraudulent Scheme

Sun-Diamond was found guilty on Counts III and IV of committing wire fraud in violation of 18 U.S.C. §§ 1343 & 1346, and on Counts V through IX of violating the Federal Election Campaign Act, 2 U.S.C. §§ 441b(a) & 441f ("FECA"). Both sets of convictions flow from a scheme of Richard Douglas and James H. Lake to help repay the debts of the failed congressional campaign of Mike Espy's brother Henry. The following facts about the scheme come from the testimony of Lake, who was granted immunity by prosecutors in exchange for his cooperation.

Lake was one of the founding partners of a Washington based firm, Robinson Lake Sawyer & Miller ("RLSM"), which handled communications and public relations matters for Sun-Diamond.[7] Sun-Diamond retained RLSM for a fee of $20,000 a month; Douglas oversaw Sun-Diamond's dealings with RLSM and maintained his own office there. RLSM was a wholly-owned subsidiary of Bozell Worldwide, Inc. ("Bozell").

After Mike Espy became Secretary of Agriculture, Henry Espy unsuccessfully pursued election to his brother's vacant seat in Congress, building up a sizable campaign debt in the process. In February 1994 Douglas left a telephone message at Lake's office--a crucial act for jurisdiction over one of the wire fraud counts. When Lake contacted Douglas, he learned that Secretary Espy had asked Douglas for help in retiring his brother's campaign debt. Lake immediately offered to donate

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[7] At certain points in the record this firm is referred to by somewhat different names, such as "RLLM/SMG" (Robinson, Lake, Lerer, Montgomery/Sawyer, Miller Group). For simplicity we will refer to Lake's partnership as RLSM throughout.

$1,000, the maximum permissible individual contribution. Douglas replied that he had to raise at least $5,000 fast, and that he needed Lake's help. He then proposed a way around the campaign finance restrictions. If Lake would get five RLSM employees (including Lake himself) to write a check for $1,000 each, Douglas would find a way for Sun-Diamond to reimburse them all. Lake knew the scheme was illegal--corporations are forbidden to make contributions "in connection with any election" for Congress, 2 U.S.C. § 441b(a), and no one may make a campaign contribution in the name of another person, 2 U.S.C. § 441f--but agreed to participate anyway. Lake testified that no one else at RLSM or Bozell knew about the plan.

Lake wrote a $1,000 check in his own name and then approached the four RLSM employees identified by Douglas. Three of them agreed to pay up. (A fourth-- presumably suspicious about the notion of a reimbursable campaign contribution--declined.) Lake then passed the checks worth $4,000 to Douglas, who deposited them in a "Henry Espy for Congress" account he had opened.

As the vehicle for reimbursement, Douglas settled on the Joint Center Dinner, an annual benefit for which RLSM and Lake had in the past routinely bought tickets on Sun-Diamond's behalf. Lake's staff prepared an internal RLSM document authorizing reimbursement to Lake for his supposed purchase of tickets to the dinner in the amount of $5,000 (even though he had raised only $4,000 for Henry Espy). The same document became part of the monthly invoice sent to Sun-Diamond, billing the client $5,000 for the fictitious dinner attendance on top of its $20,000 monthly retainer and other expenses. Lake received a $5,000 reimbursement check from Bozell, which he cashed and used to pay back the three other individual contributors (apparently pocketing the extra $1,000 for himself). Douglas, as part of his normal duties at Sun-Diamond, approved the payment to RLSM, which eventually went through. The net result: a $5,000 expenditure by Sun-Diamond, $4,000 of which went into Henry Espy's campaign coffers and $1,000 into James H.

Lake's pocket.[8] The independent counsel charged that the scheme worked a fraud on Bozell and RLSM, depriving the former (albeit temporarily) of $5,000, and depriving the latter of the "honest services" of its agent Lake under 18 U.S.C. § 1346. The jury convicted, evidently convinced that at least one such deprivation occurred. The jury also found Sun-Diamond guilty of making illegal campaign contributions in violation of FECA, 2 U.S.C. §§ 441b(a) & 441f.

As a threshold matter, Sun-Diamond raises a challenge which it says goes equally to the wire fraud and FECA counts. Richard Douglas's campaign contribution scheme cannot be attributed to it, Sun-Diamond argues, because Douglas was not acting with an intent to benefit the corporation. It is true, as the district court instructed the jury in this case, that an agent's acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal.[9] Here, Sun-Diamond says, Douglas's scheme was designed to--and did in fact--*defraud* his employer, not benefit it. In this circumstance, it strenuously argues, there can be no imputation: "[T]o establish precedent holding a principal *criminally* liable for the acts of an agent who defrauds and deceives the principal while pursuing matters within his self-interest merely because the agent's conduct *may* provide some incidental benefit to the principal serves to punish innocent principals with no countervailing policy justifications." Appellant's Reply Br. at 16 n.9.

This argument has considerable intuitive appeal--Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges. The facts in the record, however--

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[8] In October 1995 RLSM terminated its relationship with Sun-Diamond and returned the $5,000 payment.

[9] In a civil case, there may be no need to show that the agent acted to further the principal's interests--a showing of "apparent authority" is often enough. See *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 573-74, 102 S.Ct. 1935, 1946-47, 72 L.Ed.2d 330 (1982) (private antitrust action).

that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it--do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit. See, e.g., *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-07 (4th Cir.1985) (agent's conduct which is actually or potentially detrimental to corporation may nonetheless be imputed to corporation in criminal case if motivated at least in part by intent to benefit it); cf. *Local 1814, International Longshoremen's Association, AFL-CIO v. NLRB*, 735 F.2d 1384, 1395 (D.C.Cir.1984) ("[T]he acts of an agent motivated partly by self-interest--even where self-interest is the predominant motive--lie within the scope of employment so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.'") (quoting *Restatement (Second) of Agency* § 236 & comment b (1957)). Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.

And the answer to Sun-Diamond's claim of the absence of any "countervailing policy justification" is simply the justification usually offered in support of holding corporate principals liable for the illegal acts of their agents: to increase incentives for corporations to monitor and prevent illegal employee conduct. See Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 Colum. L.Rev. 1252, 1263 & n.49 (1996). One might well question this justification--and scholars have. See, e.g., Daniel R. Fischel

and Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996) (arguing that corporate criminal liability spurs excessive monitoring and litigation costs and should be discarded in favor of civil liability); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833 (1994) (arguing that strict corporate liability may *deter* corporate monitoring by making criminal exposure more likely, so that its imposition may increase the likelihood of crime). Moreover, the justification may be at its weakest in cases like this one, where the offending employee breaches a duty of honesty to the very corporation whose goals he aims to advance. In any event, Sun-Diamond's argument here, whatever its merit as an issue of policy, has no real grounding in the relevant statutes. And Sun-Diamond does not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909), or the development of some new theory.

Sun-Diamond also raises a narrower objection concerning imputation, one which goes only to the fraud counts. To the extent Douglas's conduct is to be imputed to his employer, argues Sun-Diamond, then so must Lake's be imputed to his employers (RLSM and Bozell). Both men occupied high-level management positions in their respective firms, and both men's firms sought to establish and maintain good relations with Secretary Espy. If Douglas's knowledge can be imputed to Sun-Diamond to hold it responsible for Douglas's acts, then Lake's must be imputed to his employers, RLSM and Bozell, and they cannot be victims.

Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption--that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not. Imputation is a legal fiction designed

to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims. A rule that makes victim wariness a condition of criminally punishing the perpetrator--unlike, say, a rule of contributory negligence in tort--might not inspire much extra precaution in potential victims. However much they may benefit from the criminalization of fraud generally, potential victims (who have many incentives to avoid being gulled, independent of the criminal law) seem unlikely to step up their precautions just to increase the ex ante chances that their deceivers will face criminal sanctions--or so Congress could reasonably conclude. Thus, when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even "gullible." See *United States v. Brien*, 617 F.2d 299, 311 (1st Cir.1980). Indeed, Congress's adoption of 18 U.S.C. § 1346, specifying that the term "scheme or artifice to defraud," as used in various federal criminal fraud statutes, should include schemes to deprive a principal "of the intangible right of honest services," is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility.

We pause briefly over a final threshold issue before addressing the core of Sun-Diamond's challenge to the fraud convictions. The wire fraud statute forbids the use of the interstate telephone system "for the purpose of executing" a scheme or artifice to defraud. 18 U.S.C. § 1343. Sun-Diamond says the telephone message left by Douglas for Lake preceded their joint concoction of the campaign contribution scheme and thus could not, as a matter of law, have furthered the scheme.[10] There was, however, ample

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[10] This challenge goes only to Count III. The wire communication underlying Count IV was the electronic transmission of the $5,000 billable expense report from RLSM to Bozell.

evidence from which the jury could find that Douglas already had some sort of fraudulent plan in mind when he placed the initial call and left the message. In other words, the jury could have found that Douglas used the telephone system "prior to, and as one step toward, the receipt of the fruits of the fraud," *Kann v. United States*, 323 U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944), placing the case within the coverage of § 1343.

Sun-Diamond's core challenge to the wire fraud counts raises more serious concerns. The district court charged the jury on two alternative routes to fraud liability. It could convict, said the court, if it found "that Sun-Diamond Growers of California devised a scheme or artifice to defraud with one or both [of] the two following objectives. One, to obtain even temporarily $5,000 from Bozell, Inc. by means of false pretense and representations in order to make an illegal corporate campaign contribution to Henry Espy for Congress Committee. Two, to deprive Bozell, Inc. and [RLSM] of the honest, conscientious, faithful, loyal, disinterested and unbiased services of its employee, James Lake." Because the jury charge was phrased in the disjunctive we must examine the legal sufficiency of each basis for liability, to ensure that the jury did not convict on a legally impermissible ground. See *Griffin v. United States*, 502 U.S. 46, 59, 112 S.Ct. 466, 474, 116 L.Ed.2d 371 (1991) (general verdict based on alternative grounds of liability will be upheld as long as both grounds are legally adequate, even if one is factually inadequate).

As for the first possible objective, we admit that it is not immediately obvious how the contribution scheme could have been designed to deprive Bozell even temporarily of its money or property. Sun-Diamond, through Douglas, caused Bozell to make a routine advance of $5,000 with every expectation that Sun-Diamond would provide prompt reimbursement, and in fact it reimbursed the expense promptly and in full. As the district court correctly noted in the sentencing phase, Bozell was deprived only of the time value of the sum advanced, a deprivation it surely considered

negligible judging from the routine and informal nature of the transaction.

In a case involving fraudulently obtained consumer credit, however, we held that where a defendant makes "material misrepresentations designed to induce an extension of credit that would not otherwise be made, the jury [may] reasonably infer intent to defraud," even if the borrower intended in good faith to repay the loan. *United States v. Alston*, 609 F.2d 531, 538 (D.C.Cir.1979). Moreover, other courts have held that actual repayment is no defense to a charge of fraudulently obtaining a loan, presumably because a loan obtained by fraud subjects the lender to a greater risk of loss than it would have voluntarily borne were it fully informed. *United States v. Scott*, 701 F.2d 1340, 1346-48 (11th Cir.1983); *United States v. Sindona*, 636 F.2d 792, 800 (2d Cir.1980); see also *United States v. Hollis*, 971 F.2d 1441, 1452-53 (10th Cir.1992) (repayment not a defense to bank fraud under 18 U.S.C. § 1344); *United States v. Allen*, 76 F.3d 1348, 1358-59 (5th Cir.1996) (bank was defrauded, at least temporarily, when cashier's checks were fraudulently drawn on bank's account, even though bank was reimbursed in full by holding company at end of month). Notably, to the extent repayment in those cases included interest they did not even feature the time-value deprivation that is present here. Moreover, although the misrepresentation here did not go to the likelihood of the advance being repaid, it was nonetheless material: had Bozell known that the $5,000 was being used to launder an illegal campaign contribution rather than to reserve a table at a charitable dinner, it would not have authorized the advance. Just as deceitful assurances of legality in a conventional loan expose the lender to costly legal entanglements (quite apart from risks of non-repayment), so too did the concealment here.[11]

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[11] Sun-Diamond also offers another reason why Douglas could not have intended to defraud Bozell. According to Sun-Diamond, Douglas anticipated that Sun-Diamond would reimburse Lake directly, or at least

The second alternative ground of liability was that Sun-Diamond defrauded RLSM of the honest services of its agent, James H. Lake, in violation of 18 U.S.C. § 1346. Congress enacted that provision in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), which held that the mail fraud statute's coverage was limited to deprivations of property.[12] Section 1346 says simply that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The "honest services" theory has typically been used, both in cases up to *McNally* and again under § 1346, as a tool for prosecuting corrupt public officials who have deprived citizens of their right to honest representation. See *United States v. Paradies*, 98 F.3d 1266, 1283 n. 30 (11th Cir.1996) (collecting cases). But it has also been used, as here, to prosecute private citizens who defraud private entities. See, e.g., *United States v. Lemire*, 720 F.2d 1327 (D.C.Cir.1983); *United States v. DeFries*, 129 F.3d 1293, 1305-06 (D.C.Cir.1997); *United States v. Jain*, 93 F.3d 436 (8th Cir.1996); *United States v. Frost*, 125 F.3d 346 (6th Cir.1997); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir.1994); *United States v. Cochran*, 109 F.3d 660 (10th Cir.1997); *United States v. Gray*, 96 F.3d 769 (5th Cir.1996).

In the private sector context, § 1346 poses special risks. Every material act of dishonesty by an employee deprives the

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that Lake's employer would await payment from Sun-Diamond before reimbursing Lake, thus avoiding even a temporary deprivation. (In fact Sun-Diamond contends, implausibly, that there was no evidence from which a jury could infer that Douglas even knew of Bozell's existence.) Given Douglas's experience with Sun-Diamond/RLSM billing practices, however, he could reasonably have foreseen the possibility that Lake would seek an advance from his employer or its parent company at the time he hatched the scheme.

[12] The elements required for conviction under § 1341 (mail fraud) and § 1343 (wire fraud) are identical except for the means of communication. *United States v. Lemire*, 720 F.2d 1327, 1334-35 n. 6 (D.C.Cir.1983).

employer of that worker's "honest services," yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system. Aware of the risk that federal criminal liability could metastasize, we held in *Lemire* that "not every breach of a fiduciary duty works a criminal fraud." *Lemire*, 720 F.2d at 1335, quoting *United States v. George*, 477 F.2d 508, 512 (7th Cir.1973). Rather, "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337.[13] Absent reasonably foreseeable economic harm, "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict." *Frost*, 125 F.3d at 368.

The independent counsel says that Douglas and Lake's fraudulent scheme threatened serious economic harm to RLSM, because disclosure of a name partner's fraudulent use of RLSM's offices to funnel illegal contributions to a political candidate would severely damage the firm's reputation. The district court agreed, 964 F.Supp. at 493-94. As Lake testified, the chief assets of a public relations firm are its legitimacy and credibility in the eyes of current and potential clients. Both stood to be undermined by Douglas and Lake's actions. There is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out.

Sun-Diamond, however, says this is not enough. It contends that in the private sector context § 1346 and *Lemire* demand a showing that the defendant *intended* to cause economic harm to his victim, not merely that he could have

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[13] *Lemire* was a pre-§ 1346 decision, but Congress's evident intent in enacting that provision was to revive pre-*McNally* caselaw, at least with respect to the deprivation of honest services. See, e.g., *Frost*, 125 F.3d at 364 ("We therefore hold that § 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services.").

reasonably foreseen such harm. Since the economic harm identified by the independent counsel flows exclusively from disclosure of the contribution scheme, and since Douglas surely did not intend for his scheme to be revealed (except possibly to Mike Espy, so that the Secretary's gratitude could be properly directed), Sun-Diamond reasons that it is free from liability under § 1346. In response to this argument, it will not do to cite "the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 278, 99 S.Ct. 2282, 2295, 60 L.Ed.2d 870 (1979). Applying the presumption to the actual detection and revelation of an illegal scheme would threaten to turn the word "intent" inside out. Is a criminal who foresees his own capture thereby said to intend it? If so, are especially elusive criminals, whose apprehension is *ex ante* relatively unlikely, in a better legal position than clumsy ones?

We need not address these questions, because we disagree with Sun-Diamond's contention that § 1346 and *Lemire* require the government to show that the defendant intended to cause economic harm to his victim. Sun-Diamond appears to confuse the requirement of an intent to defraud (amply met here, since the crux of the scheme was the submission of a fictitious expense report to RLSM) with a requirement of intent to cause economic harm. But *Lemire* did not go so far as to say that economic harm must be part of the defendant's intent in a private-sector "honest services" case--only that economic harm be within the defendant's reasonable contemplation. Although *Lemire* dealt with failure to disclose a conflict of interest rather than with an active scheme to defraud, its treatment of the foreseeability issue governs this case:

> So long as the jury finds the non-disclosure furthers a scheme to abuse the trust of an employer in a manner that makes an identifiable harm to him, apart from the breach itself, *reasonably foreseeable*,

> it may convict the employee of wire fraud. The crucial determination must be whether the jury could infer that the defendant *might reasonably have contemplated* some concrete business harm to his employer . . .

Lemire, 720 F.2d at 1337 (emphasis added); see also *United States v. Von Barta*, 635 F.2d 999, 1005-06 n. 14 (2d Cir.1980) (relied on in *Lemire*). As we reaffirmed recently, "*Lemire* held that breaches of fiduciary duty are criminally fraudulent only when 'accompanied by a misrepresentation or nondisclosure that is intended *or is contemplated* to deprive the person to whom the duty is owed of some legally significant benefit.' " *DeFries*, 129 F.3d at 1306, quoting *Lemire*, 720 F.2d at 1335 (emphasis added). See also *Frost*, 125 F.3d at 368 (holding that, in cases where employee is charged with defrauding private employer of his own honest services, "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee *foresaw or reasonably should have foreseen* that his employer might suffer an economic harm as a result of the breach.") (emphasis added); *D'Amato*, 39 F.3d at 1257 (pre-§ 1346 case holding that misrepresentations amounting only to a deceit "must be coupled with a contemplated harm to the victim").

We therefore affirm the convictions for wire fraud on Counts III and IV.[14]

Sentencing Issues

Sun-Diamond challenges two aspects of its sentence: the district court's upward departure based on Espy's position as Secretary of Agriculture, and the imposition of reporting

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[14]Sun-Diamond does not challenge the adequacy of the jury charge on the "honest services" theory of liability under §§ 1343 & 1346.

requirements on the member cooperatives. We agree with Sun-Diamond and reverse on both points.

District courts may make upward departures from the Sentencing Guidelines only if "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 5K2.0. We review district court determinations that a given factor is present in a particular case to a degree not adequately considered by the Commission only for abuse of discretion, because "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996). But whether a given factor could *ever* be a permissible basis for departure is a question of law which we address *de novo*. *Id.* Here, the issue is in a sense one of degree--how much authority and status might elevate a position above even the rank for which the Guidelines prescribe an eight-level hike--but it also poses the onetime issue of whether cabinet-level officers enjoy such lofty status, hardly the sort of fact-intensive issue calling for extreme deference.

The guideline applicable to violations of the gratuity statute prescribes a base offense level of 7. U.S.S.G. § 2C1.2. It calls for a two-level increase if the offense involved more than one gratuity, and an eight-level increase

> [i]f the gratuity was given, or to be given, to an elected official or any official holding a high-level decision making or sensitive position.

Id. The district court imposed both the two-level and the eight-level increase, bringing the offense level to 17. It then appended an additional two-level increase, finding that the Guidelines did not adequately take into account Espy's position as a cabinet-level official. This increase in offense

level from 17 to 19 doubled Sun-Diamond's base fine from $250,000 to $500,000. U.S.S.G. § 8C2.4. The court then assigned Sun-Diamond a "culpability score" of 9 out of a possible 10, see *id.* § 8C2.5, a determination Sun-Diamond does not challenge here. This culpability score dictated a minimum multiplier of 1.8 and a maximum of 3.6, id. § 8C2.6, leading to an applicable fine range of $900,000 to $1,800,000, from which the court chose a figure in the "upper range"--$1,500,000.

In support of departing upward on account of the high level of the donee's position, the district court reasoned:

> The President has but one cabinet with select members who the court deems to be on a higher level with regard to the type of responsibility which is otherwise contemplated by the guidelines, and the Secretary of Agriculture, in fact, is tenth in the order of succession to the Office of the Presidency. That is not an insignificant fact, and as unlikely as it may be that the Secretary of Agriculture would assume the Presidency of the United States because circumstances would not normally present that opportunity, nevertheless, there is a reason for creating a pecking order to the position which many believe is the position of the most powerful person on the face of the earth.
>
> In any event, the court [notes] for example that Secretary Espy administered a budget of $65 and one half billion, this figure represents 4.3 percent of the totai federal budget. He's responsible for a great work force and makes decisions frequently that have a significant and broad and wide-ranging effect on the American population, and some might believe on the population of . . . other parts of the world.

As the Secretary of Agriculture obviously holds a "high-level decision-making or sensitive position," it is clear that the district court rested its departure not on a finding that cabinet-level status was the *kind* of factor the Sentencing Commission failed to consider in formulating § 2C1.2, but on a belief that his position is so high-level that it represents an aggravating circumstance present to a *degree* not taken into account by the Commission.

This conclusion is at odds with the Sentencing Commission's explanation of § 2C1.2.[15] The Application Notes explain that "'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility." U.S.S.G. § 2C1.2, App. Note 1. We do not think the Secretary of Agriculture holds a position that in level or sensitivity differs in any material degree from persons the Application Note explicitly says were within the Commission's contemplation.

Since the Secretary administers an agency, a straightforward reading of the Application Note strongly suggests that he falls within the "agency administrator" category. The independent counsel says that this term was meant to refer to lower-level program administrators, of which it says there are 85 or so within USDA alone, Appellee's Br. at 43 n.15, but never explains why we should assume the Sentencing Commission had such a limited category in mind. The Application Note expressly lists judges as the sort of high-level officials for which the eight-level departure is appropriate. Perhaps our perspective is skewed, but offering a gratuity to a life-tenured federal judge seems to us at least as culpable as offering one to a cabinet secretary--

[15] "In determining whether a circumstance was adequately taken into consideration the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b).

indeed, we suspect most citizens would consider the former a more troubling breach of public trust than the latter. To permit a two-level departure for the latter, when such a departure is specifically precluded for the former, appears illogical.

Nor is the district court's decision rescued by its observations about presidential succession. The Guideline includes elected officials without apparent regard to the loftiness or sensitivity of their positions, and the Application Note says nothing to suggest variation within the elected-official category. Thus it appears to sweep in officials ranging in rank from Representative to President. Even assuming that a case involving the President might present a *sui generis* situation warranting departure, Sun-Diamond points out that the Speaker of the House is second in line to the presidency after the Vice President, 3 U.S.C. § 19, and yet is also presumably taken into account by § 2C1.2 as an "elected official." The independent counsel responds that "perhaps the Sentencing Commission did not take into consideration the position and power of the Speaker of the House when it drafted the bribery and gratuity guidelines." Appellee's Br. at 45 n.16. Conceivably, but more likely the Commission meant, as it said, to lump all federal elected officials together, in contrast with other officials whose rank was seen to vary enough to require consideration of levels of responsibility. Similarly, the Attorney General--seventh in line to the presidency--seems to fit within the Application Note's "supervisory law enforcement officers" category. Though we need not, and do not, decide today the status of these officials with respect to § 2C1.2, their seeming inclusion argues strongly against the idea that the Sentencing Commission failed to take adequately into account the degree of responsibility of an official further down the line of presidential succession.

Moreover, the district court's approach makes one wonder how far one must go down the line of succession before one finally reaches the heartland of § 2C1.2. The

Secretary of Agriculture is in fact ninth in the line of succession, 3 U.S.C. § 19, not tenth as the district court stated.[16] This makes his connection to ultimate power just as attenuated as that of the anti-hero of "Kind Hearts and Coronets," who had to murder eight Alec Guinnesses to become Duke of Chalfont. What of the Secretary of Health and Human Services, at number twelve in the queue, *id.*, or the Secretary of Veterans Affairs, at seventeen, *id.*? Of course, questions of line-drawing are often difficult, and in the sentencing arena such questions are normally best resolved by the district courts on a case-by-case basis. Here, however, the factor invoked in support of departure--cabinet-level status--is not one that the district courts enjoy any comparative advantage in assessing, unlike such fine-grained, fact-bound circumstances as extreme psychological injury, see U.S.S.G. § 5K2.3, or victim misconduct, see *id.* § 5K2.10. We conclude that the two-level upward departure was impermissible.

Sun-Diamond also challenges the imposition of reporting requirements on its member cooperatives. The district court declared, as a condition of probation, that "Sun-Diamond and its members [sic] cooperatives shall provide quarterly submissions to the probation officer reporting all of the organization's expenditures related to all federal employees, office holders or candidates for federal office [including] any expenditure related [to] the procurement of any federal government contract, creation of a federal law or regulation, or the development of any federal policy." These requirements were to continue in force for five years.

We recognize that the sentencing judge has broad discretion to establish conditions of probation. *Lemire*, 720 F.2d at 1352. But we know of no precedent for the imposition of probationary conditions on entities who are not defendants,

[16] The current Secretary of Agriculture, however, is in practical effect eighth in line, since Secretary of State Madeleine Albright, having been born abroad, is ineligible. See U.S. Const. art. II, § 1, cl. 5.

nor even agents of defendants--the latter category problematic in its own right, but much more plausibly legitimate than the present case. Although the independent counsel paints Sun-Diamond as a mere alter ego of the cooperatives that own it, we are not persuaded. The member cooperatives have their own corporate identities, boards of directors, employees, assets and liabilities, as does Sun-Diamond. Their power to control Sun-Diamond seems no greater than the power of ordinary shareholders to control a corporation.

As the Ninth Circuit has explained, imposition of a condition on a third party exposes the defendant to revocation of probation for "violations" by persons not under his control. *United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir.1990). Cf. *Fiore v. United States*, 696 F.2d 205, 208-09 (2d Cir.1982) (reversing condition of probation imposed on defendant who was president, secretary, sole stockholder and only full-time employee of corporate co-defendant, which had required him to pay fine imposed on corporation). And 18 U.S.C. § 3563, which enumerates mandatory and discretionary conditions of probation, specifies in every one of them the "defendant" as the person to be burdened. See *Sweeney*, 914 F.2d at 1263. As the member cooperatives were not made defendants and given an opportunity to be heard, they may not now be subjected to probation.

* * *

We reverse and remand for new trial on Count I; we affirm the convictions on Counts III through IX; and we vacate Sun-Diamond's sentence and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**
96cr00193-01

United States of America,
Appellee

v.

Sun-Diamond Growers of California,
Appellant

BEFORE: Williams, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of appellant and appellee, filed May 4, 1998, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**
96cr00193-01

United States of America,
Appellee

v.

Sun-Diamond Growers of California,
Appellant

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Wald concurring in the denial of rehearing in banc is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

WALD, *Circuit Judge, concurring in the denial of rehearing* en banc:

I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. *See United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978). However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention. The ephemeral distinction between bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's "position," rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the "snicker test" with laymen. I read the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts. Nonetheless, I admit that the main distinction the panel draws between gifts motivated by an official's "position" and gifts motivated by an official's "acts" eludes me altogether. I suppose it is conceivable that someone might give gifts to a high official simply to create the impression that he is a "big shot" or "insider," without regard to how the official wields his power. But this hardly seems likely in the case of a regulated entity. Much more likely is the assumption that inherent in an official's "position" is his capacity to perform regulatory acts which will affect the gift-giver.

APPENDIX C

UNITED STATES of America

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,
Defendant.

Crim. Action No. 96-193 RMU.

United States District Court,
District of Columbia.

Sept. 9, 1996.

Donald C. Smaltz, Theodore S. Greenberg, Kathleen M. Nicolaides, Barry Coburn, Office of Independent Counsel, Alexandria, VA, for Plaintiff.

Richard A. Hibey, Eric W. Bloom, Winston & Strawn, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

URBINA, District Judge.

Denying Sun-Diamond's Motion to Dismiss the Indictment

I. Background

On September 9, 1994, pursuant to 28 U.S.C. Section 593(b), the United States Court of Appeals for the District of Columbia Circuit, Special Division for the Appointment of Independent Counsels (Special Division), appointed Donald C. Smaltz Independent Counsel to investigate whether former

Secretary of Agriculture Alphonse Michael (Mike) Espy (Secretary Espy) violated federal criminal law by accepting improper gifts from organizations or individuals with business matters pending before the Department of Agriculture while he was Secretary of Agriculture.

Sun-Diamond, a large agricultural cooperative based in California, had business matters pending before the Department of Agriculture during Secretary Espy's tenure. Sun-Diamond is owned by five member cooperatives: Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, Inc., Valley Fig Growers, and Hazelnut Growers of Oregon. In December 1994, the Office of Independent Counsel (OIC) began its investigation of Sun-Diamond using a grand jury convened by this court. The grand jury returned an indictment against Sun-Diamond alleging that the defendant had unlawfully provided $9,000 worth of gifts, directly or indirectly, to Secretary Espy, in violation of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A). The indictment further alleges that Sun-Diamond devised and executed a scheme to make an unlawful corporate contribution, in the name of another, in the amount of $4,000 to a federal candidate for office, in violation of 2 U.S.C. § 441b(a) and 441f.

Specifically, count I alleges that Sun-Diamond, through its former Senior Vice President, Richard Douglas (Mr. Douglas), expended on Secretary Espy's behalf, over a 14 month period, approximately $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, approximately $2,427 for luggage, approximately $665 for meals, and approximately $524 for a framed print, packing for the print, and a crystal bowl. Count I also charges that all of the expenses associated with the gratuities given by Mr. Douglas to Secretary Espy were reimbursed by Sun-Diamond as company business expenses. Count II alleges that Mr. Douglas advanced $3,100 to Secretary Espy's girlfriend, Patricia Dempsey, to pay for the cost of an airplane ticket so that she could accompany Secretary Espy to a trade association conference in Greece. The indictment further alleges that the trade association that sponsored the conference reimbursed Mr. Douglas.

Counts III through IX allege the following: Mr. Douglas and James H. Lake (Mr. Lake), a principal of Robinson, Lake, Sawyer and Miller (Robinson-Lake), a public relations firm in Washington, D.C., together devised a scheme to enable Sun-Diamond to make an unlawful corporate contribution in the name of another.[1] To effect this contribution, Mr. Douglas and Mr. Lake allegedly agreed that Mr. Lake would obtain $1,000 contribution checks from several Robinson-Lake employees. Robinson-Lake then invoiced Sun-Diamond for a false and fictitious expense sufficient to cover these contributions. Finally, Sun-Diamond's payment of the expense to Robinson-Lake was used to reimburse the individuals that advanced the campaign contributions.[2]

II. Discussion

This matter comes before the court upon Sun-Diamond's motion to dismiss the indictment in this case. Sun-Diamond raises six arguments in support of its motion. Each argument addresses one or more counts contained in the indictment. First, Sun-Diamond argues that count I, which charges a violation of the gratuity statute, should be dismissed because it fails to allege that Sun-Diamond provided things of value to Secretary Espy to reward him for an act he had already performed or had committed himself to perform. Second, Sun- Diamond posits that count II, which also alleges a violation of the gratuity statute, should be dismissed because it fails to allege that Sun-Diamond provided a "thing of value" to Secretary Espy. Third, Sun-Diamond moves to dismiss counts I and II because the allegations set forth therein do not distinguish between innocent gift giving and illegal gratuities.

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[1] Henry Espy, Secretary Espy's brother, was to be the beneficiary of the contribution. Henry Espy ran, unsuccessfully, for the congressional seat vacated by Secretary Espy when he became Secretary of Agriculture.

[2] Counts III and IV allege wire fraud. Counts V through IX allege violations of the Federal Election Campaign Act.

Fourth, Sun-Diamond requests that the court dismiss counts III through IX of the indictment because the violations alleged in those counts are outside the scope of the independent counsel's jurisdiction. Fifth, Sun-Diamond moves to dismiss count III, which alleges wire fraud, because the alleged wire communication at issue did not further the execution of the alleged scheme.[3] Lastly, Sun-Diamond moves to dismiss, or in the alternative strike, the part of counts III and IV that allege that Mr. Douglas and Mr. Lake sought to defraud two entities, Robinson-Lake and its parent company, Bozell Worldwide, Inc., of the intangible right to Mr. Lake's honest services. The court will address each argument *seriatim*.

A. Gratuity Statute

1. Introduction

Sun-Diamond moves to dismiss count I of the indictment on the basis that the indictment fails to allege that Sun-Diamond provided things of value to Secretary Espy for an improper purpose. More particularly, Sun-Diamond claims that the indictment does not allege that Sun-Diamond provided things of value to reward Secretary Espy for a specific act he had already performed or was already committed to perform. Sun-Diamond contends that the indictment must allege and the OIC must demonstrate a nexus between the alleged gratuity and "a definite official act for which [Sun-Diamond] intend[ed] to compensate[,]" Secretary Espy in order for its conduct to be in violation of 18 U.S.C. § 201(c), the gratuity statute. Given this required nexus, Sun-Diamond argues, the indictment must allege that it "intended to reward [Secretary Espy] for past action or action [the Secretary] was already committed to take." As fully discussed *infra*, to sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus

[3] The alleged scheme relates to the effort by Mr. Douglas and Mr. Lake to make an unlawful campaign contribution to help retire Henry Espy's campaign debt.

between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position. Accordingly, the court denies Sun-Diamond's motion to dismiss count I.

2. Analysis

The indictment alleges that there were two matters pending before the Department of Agriculture and Secretary Espy, in which Sun-Diamond had a significant economic stake. They were the market promotion program (MPP) and the issue of whether the fumigant methyl bromide would be banned by the Environment Protection Agency (EPA). During 1993 and 1994, the Department of Agriculture administered a grant program, MPP, designed to increase export sales of certain U.S. agricultural commodities abroad. Under the MPP, the Secretary of Agriculture was authorized to award government funds to trade organizations, if the Secretary determined that such organizations would significantly contribute to the sale of U.S. farm commodities abroad. To receive money to market their products abroad, trade organizations submitted marketing plan applications to the Department of Agriculture. By law, the Secretary of Agriculture had to approve the award of MPP money to each trade organization. The trade organizations would in turn award money to companies, like the member cooperatives of Sun-Diamond, to pay for part of their marketing campaigns in foreign countries.

Beginning in or about August 1993, the Department of Agriculture was required by law to develop regulations which gave small-sized entities preference in obtaining certain MPP funds. During that time, the Department of Agriculture entertained the issue of whether to include cooperatives in the definition of a small-sized entity. The indictment alleges that Sun-Diamond wanted the Secretary of Agriculture to direct the Department of Agriculture to promulgate MPP regulations

that would allow Sun-Diamond member cooperatives to receive the preferences provided for small entities. In addition, Sun-Diamond wanted the Department of Agriculture to continue to study the issue with a view towards giving cooperatives the same preference given to small-sized entities.

The other matter pending before the Department of Agriculture in which Sun-Diamond had an economic stake involved methyl bromide. Methyl bromide was a chemical used to kill pests and other insects when planting orchards and fields, as well as after a commodity was harvested. Certain Sun-Diamond member cooperatives used the chemical for post-harvest fumigation of walnuts, prunes, and figs.

In 1992, the EPA announced plans to promulgate a rule which would phase out and ultimately bar the use of the chemical in the U.S. In 1993 and 1994, Sun-Diamond, and more particularly Diamond Walnut Growers, Inc., was concerned that the loss of methyl bromide and a lack of a viable alternative thereto, would hurt their ability to sell their products. Consequently, Sun-Diamond sought the assistance of the Department of Agriculture to persuade the EPA to delay promulgating the rule that would phase out and eliminate the use of methyl bromide. Sun-Diamond also sought to have the Department of Agriculture increase its funding for research for alternatives to methyl bromide in the event that the use of the chemical became restricted or prohibited.

Count I alleges that Sun-Diamond violated Section 201(c)(1)(A) by providing Secretary Espy with improper gratuities. Section 201(c)(1)(A), provides, in pertinent part,

> Whoever . . . gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined

> under this title or imprisoned not more than two years, or both.[4]

Sun-Diamond concedes that Secretary Espy was a public official during the relevant time period of the indictment, namely, January 5, 1993 through March 11, 1994. Additionally, Sun-Diamond acknowledges that count I sufficiently identifies things "of value" that Sun-Diamond allegedly gave to Secretary Espy, e.g., tickets, meals and limousines for the U.S. Open Tennis Tournament, luggage, and meals at restaurants. Sun-Diamond, however, maintains that it did not give these items of value to Secretary Espy "for or because of any official act performed or to be performed by" Secretary Espy.[5] The pertinent official acts relate to the MPP and methyl bromide, the two matters pending before the Department of Agriculture in which Sun-Diamond had a significant economic stake.

The issue before the court is whether, with respect to appointed officials, the gratuity statute requires the indictment to allege a nexus between the provision of things of value and a specific official act performed or committed to be

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[4] Count I also alleges that Sun-Diamond violated 18 U.S.C. § 2, the aiding and abetting statute, which provides,

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(a) and (b).

[5] An official act is defined by 18 U.S.C. § 201(a)(3) (West Supp.1996) as being,

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

performed by the appointed official. This District Court and the various federal courts of appeal that have addressed this precise issue have concluded that the gratuity statute does not require such nexus to be alleged by an indictment. Rather, it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided "simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation." *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C. 1989) (emphasis in the original). "The Government need not prove that the gratuity was given in exchange for any specific official act; there need be no '*quid pro quo* . . . '" *Id.* "[T]he Government must [only] show that Defendant acted simply because of [the individual's] official position . . ." *Id.*[6]

Sun-Diamond's reliance on *United States v. Brewster*, 506 F.2d 62 (D.C. Cir.1974), is unavailing. In *Brewster*, a former United States Senator was charged with bribery and with accepting illegal gratuities. He was acquitted of the bribery charges. He was, however, convicted of accepting illegal gratuities in the form of campaign contributions that he received from a mail-order company that had an interest in defeating enactment of pending legislation to increase postal rates. *Id.* at 67. The Senator appealed his convictions and the U.S. Court of Appeals for the District of Columbia Circuit reversed on the basis that the jury instructions did not distinguish "with indisputable clarity" between the elements of bribery and gratuity. *Id.*

The *Brewster* court, in distinguishing between the elements constituting the crimes of accepting a bribe and accepting an illegal gratuity, explicitly stated: "The bribery section makes necessary an explicit quid pro quo which *need not exist if only an illegal gratuity is involved*; the briber is the

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[6] *See also United States v. Crutchfield*, 547 F.2d 496 (9th Cir.1977); *United States v. Alessio*, 528 F.2d 1079 (9th Cir.1976), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976).

mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity[.]" *Id.* at 72 (emphasis added). This statement weakens Sun-Diamond's argument that this Circuit requires the indictment to allege that a nexus between the gratuity and a specific official act exists. Under the bribery statute, the focus is on the briber who instigates an official act. However, as *Brewster* makes clear, under the gratuity statute, the emphasis is not on the act, which the official might have done with or without the provision of an improper gratuity. Rather, the definition of "official act" denotes that the official need not have undertaken or committed himself to undertake a specific act. An official act is one which involves "any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at the time be *pending*[.]" 18 U.S.C. § 201(a)(3) (emphasis supplied). Presently, the indictment alleges that there were two matters pending before Secretary Espy in which Sun-Diamond had a significant interest. There is no indication that the gratuity statute or the definition of the term "official act" require the indictment to allege that Sun-Diamond intended to *reward* Secretary Espy for an act that he had done or committed himself to do.

In *Brewster*, the court's concern centered on an elected official's potential criminal liability under the gratuity statute. In the context of a politician receiving an illegal gratuity the court stated,

> [n]o politician who knows the identity and business of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

Id. at 81. The difficult question in *Brewster* therefore involved the ability of the jury to distinguish between illegal gratuities and legal campaign contributions. The court found

that the trial judge had not made the distinction intelligible to the jury and, as a consequence, implicitly required a heightened nexus standard between the illegal gratuity and the official act. The court required such a standard because of the Senator's status as an elected, rather than an appointed official. As the court recognized, "[e]very campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official." *Id.* at 72 n.26. In the case of elected officials, a nexus was required, otherwise, ". . . there is no distinction in the case of an elected public official between an illegal gratuity and a perfectly legitimate, honest campaign contribution." *Id.*

This concern is, however, inapplicable with respect to appointed officials. As the court subsequently explained, "the requisite [criminal] intent must be more clearly shown when the case involves a campaign contribution to 'an elected public official' than 'when the recipient is an . . . appointed official.'" *United States v. Campbell*, 684 F.2d 141, 150 n.16 (D.C. Cir. 1982) (quoting *Brewster*, 506 F.2d at 73 n.26).[7] Consequently, in cases involving appointed officials, such as the present matter, it is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture.[8]

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[7] In *Campbell*, the court upheld the conviction of a Superior Court judge for receiving an illegal gratuity. The court concluded that it was "more than sufficient" for the trial judge to require that the gratuity be given and received "knowingly and willingly," and "for or because of an official act." *Id.* at 150. The court did not require the government to establish a nexus between the gratuity and a specific official act.

[8] Because the court finds the statute to be unambiguous, it declines Sun-Diamond's invitation to apply the rule of lenity. The rule of lenity stands for the principle that if a criminal statute is subject to multiple meanings, the court should resolve any ambiguity in favor of the defendant. *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). That rule, however, is applicable only in situations where the language of the statute is not clear. *See United States v.*

Courts of appeal from other jurisdictions have similarly given Section 201(c) a broad interpretation. The Sixth Circuit has held that the "purpose of the [gratuity statute] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position." *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987). In *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978), the Fifth Circuit stated:

> [U]nder the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'. . . Thus, [the gratuity statute] makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee.

Id. at 480-481 (internal citations omitted). Importantly, our court of appeals has quoted with approval *Evans*, upon which the court in *Secord* relied. "'The gravamen of [the offense of taking an illegal gratuity] is not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation.'" *United States v. Baird*, 29 F.3d 647, 652 (D.C. Cir. 1994) (quoting *Evans*, 572 F.2d at 481). The court also cited with approval *United States v. Standefer*, 610 F.2d 1076, 1079 (3d. Cir.) (en banc), *aff'd on other grounds*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), which concluded that all that the jury needs to find under the gratuity statute is that the defendant received a gratuity because of his official position.

Schwartz, 785 F.2d 673, 681 (9th Cir.), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986).

Finally, in *United States v. Bustamante*, 45 F.3d 933 (5th Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 473, 133 L.Ed.2d 402 (1995), the court held,

> To find a public official guilty of accepting an illegal gratuity . . . no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office . . . In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation.

Id. at 940 (internal citations omitted).[9] Thus, the government need not prove that the gratuity was given in exchange for a specific official act. *Bustamante*, 45 F.3d at 941. Consequently, the indictment need not allege that Secretary Espy took or committed to take any action beneficial to Sun-Diamond with respect to the MPP and/or methyl bromide because, "[e]ven if corruption is not intended by the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the

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[9] *See United States v. Niederberger* 580 F.2d 63 (3d Cir.1978), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). In *Niederberger*, the court upheld the gratuity conviction of an IRS employee in charge of auditing a large company which provided him with golfing trips. The court made clear that the gratuity statute did not obligate the government to prove a specific intent or to establish a *quid pro quo*. *Id.* at 69. *See also United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976) (the court upheld gratuity conviction of defendant who paid part of a federal prison camp administrator's expenses during vacation because the administrator was in a position from which he could affect the conditions of confinement of the defendant's father, an inmate at the prison); *United States v. Umans*, 368 F.2d 725, 730 (2nd Cir.1966), *cert. denied*, 389 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967) (the court upheld gratuity conviction of CPA because of payments to IRS agents who disallowed a lesser portion of deductions than otherwise would have been disallowed).

donor by the donee . . . " *Evans*, 572 F.2d at 480.[10] The court therefore denies Sun-Diamond's motion to dismiss Count I of the indictment.

B. Thing of Value

I. Introduction

Sun-Diamond moves this court to dismiss count II of the indictment because it fails to allege that Sun-Diamond provided a "thing of value" to Secretary Espy. Rather, Sun-Diamond states that count II alleges that Sun-Diamond provided money to Secretary Espy's girlfriend. According to Sun-Diamond, the gratuity statute does not criminalize its conduct because the "thing of value" was not given directly to Secretary Espy. Sun-Diamond's construction of the term "thing of value," is, however, too narrow. A "thing of value" can constitute both tangible benefits, such as money, and intangible benefits, such as companionship. Because Secretary Espy received an intangible benefit from Sun-Diamond's gift to his girlfriend, Sun-Diamond's motion to dismiss count II on this basis shall be denied.

2. Analysis

Count II of the indictment alleges that Sun-Diamond Senior Vice President Richard Douglas arranged for Secretary Espy's girlfriend, Patricia Dempsey, to accompany them to Athens, Greece for a meeting of the International Nut Council (Council), whose members include Diamond Walnut, a member cooperative of Sun-Diamond. According to the indictment, the Council worked to expand the worldwide consumption of tree nuts. The indictment states that the Council thought it important to have Secretary Espy speak to

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[10] As the *Brewster* court recognized, the gratuity statute covers a wide range of conduct because it is directed at the behavior of public officials "who should exercise extraordinary caution to avoid acts potentially violative of their public trust[.]" *Id.* at 77-78.

its members at the IX World Tree Nut Congress held in Athens, Greece. The indictment alleges that Diamond Walnut wanted to use the Council to increase its exports. Count II alleges that Mr. Douglas, acting on behalf of Sun-Diamond, provided $3,100 in cash to Ms. Dempsey to cover the cost of her business class airplane ticket to Greece, and as such provided a benefit to Secretary Espy. The International Nut Council, the indictment alleges, reimbursed Mr. Douglas for these expenditures.

Secretary Espy received a benefit, albeit an intangible one, as a result of the actions allegedly taken by Mr. Douglas on behalf of Sun-Diamond. The term "thing of value" is a term of art which courts have interpreted broadly. It has been repeatedly used by Congress in many criminal statutes. *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).[11] Since the term is not defined in the gratuity statute, the court must assume that the ordinary meaning of the words express the legislative purpose behind them. *Russello v. United States*, 464 U.S. 16, 17, 104 S.Ct. 296, 297, 78 L.Ed.2d 17 (1983).

The purpose of the gratuity statute is to cover all instances in which a public official may be improperly influenced by the receipt of an object of value because of his or her status. *Evans*, 572 F.2d at 480. Pursuant to the statute, Congress sought to punish the misuse of public office. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983). To fully implement Congress' policy judgment, the term "thing of value" must be broadly construed. *Gorman*, 807 F.2d at 1305. In analyzing whether an official received a thing of value, the focus should be on the value the official

[11] The court has found nothing in the legislative history of the gratuity statute that suggests Congress intended the term thing of value to be construed more narrowly than in other criminal statutes that employ the term.

"subjectively attaches to the items received." *Id.* at 1305 (citing *Williams*, 705 F.2d at 623).

Courts have found the term to encompasses tangible, as well as intangible benefits. *Id.* For instance, under the gambling statute, amusement has been judicially interpreted to constitute a thing of value. *Girard*, 601 F.2d at 71 (citing *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715, 716-17 (1942)); *Hightower v. State*, 156 S.W.2d 327, 328 (Tex. Civ. App. 1942). Courts have also found the testimony of an important government witness to be a "thing of value." *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir.1974). Information can also be a thing of value. "For instance, state secrets might trade hands without cash consideration. Information obtained for political advantage might have value apart from its worth in dollars. In each case the information sought would have value to others, in addition to the seeker." *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir.1980) (emphasis supplied). In *Sheker*, the defendant was convicted of impersonating a federal officer in order to obtain a thing of value: The whereabouts of a witness against the defendant. *Id.* at 608-609. The court, in interpreting the term "thing of value" noted that the witness would also see a thing of value implicated--maintaining his whereabouts unknown to the defendant. *Id.* at 609. In addition, "[t]he criminal justice system, concerned with the safety of witnesses, has a similar interest." *Id.* Contrary to Sun-Diamond's implication, a thing of value does not necessarily require a direct benefit to the recipient but also includes a potential benefit to third parties.

In sum, an expansive construction of the term is necessary because "monetary worth is not the sole measure of value." *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir.1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993) (citing *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir.1986)).[12] The fact that the alleged

[12] In *Nilsen*, the court concluded that the term "thing of value" included intangible objectives, such as a defendant's attempt to extort a witness' testimony linking him to two pending state bank robbery charges.

gratuity benefited someone other than the public official is not dispositive. As a result, count II sufficiently alleges that Sun-Diamond improperly provided a thing of value to Secretary Espy. Specifically, the indictment alleges that Sun-Diamond thing provided money to Ms. Dempsey so that she could accompany Secretary Espy on his trip to Greece. In addition, the OIC contends that at trial it will establish, *inter alia*, that a portion of the $3,100 was used by Secretary Espy to pay his credit card bill which included the charge for Ms. Dempsey's airline ticket. This alleged benefit, coupled with any other intangible benefit that Secretary Espy may have received, including Ms. Dempsey's companionship, warrants the submission of this matter for the jury to determine whether in fact Secretary Espy received a benefit. *See United States v. McDade*, 827 F.Supp. 1153, 1175 (E.D.Pa.1993), *aff'd*, 28 F.3d 283 (3d Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 1312, 131 L.Ed.2d 194 (1995) (holding that the question of whether a member of Congress benefited personally from scholarship payments to his son is one which should be resolved by the jury; not the court in a pretrial motion). Accordingly, count II properly alleges that Sun-Diamond provided something of value to Secretary Espy.[13]

Sun-Diamond also contends that the conduct alleged in count II and engaged in by Mr. Douglas cannot be imputed to Sun-Diamond because Mr. Douglas provided payment to Ms. Dempsey and the International Nut Congress reimbursed Mr. Douglas. Sun-Diamond therefore argues that it is not implicated in the allegations set forth in count II. The

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Id. at 543. The Second Circuit, in a broad construction of the term thing of value, interpreted it to include commercially worthless stock which a defendant "believed" had value for himself. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983).

[13] Sun-Diamond also argues that count II must be dismissed because it fails to allege that a nexus between the purported gratuity and a specific official act existed. As the court, however, discussed in part II.A.2.*supra*, no such nexus need be alleged by the indictment.

indictment, however, need not be so explicit. There is no need for the government to set out in full, its "theory of proof" in the indictment. *United States v. Edmond*, 924 F.2d 261, 269 (D.C. Cir. 1991). The indictment must only state "the essential facts constituting the offense, not how the government plans to go about proving them." *Id.* (citing Fed.R.Crim.P. 7(c)(1)). Rule 7(c)(1) states, in pertinent part, "the indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In this case, count II of the indictment sufficiently alleges that Mr. Douglas, an officer of Sun-Diamond, provided Ms. Dempsey $3,100 to defray the cost of her airline ticket to Greece. The fact that Mr. Douglas was reimbursed by the Council and not Sun-Diamond does not mean that Mr. Douglas' conduct cannot be imputed to Sun-Diamond, as Sun-Diamond maintains. Diamond Walnut, one of the owners of Sun-Diamond, and its President were members of the Council's Executive Committee. Mr. Douglas, a Sun-Diamond Vice President, undertook actions which arguably benefited Diamond Walnut, and as a result, Sun-Diamond.

C. Vagueness

Sun-Diamond moves this court to dismiss counts I and II because the allegations set forth in those counts do not distinguish between innocent gift giving and legitimate business related conduct on the one hand, and illegal gratuities on the other. Sun-Diamond thus argues that the gratuity statute is void for vagueness as applied to Sun-Diamond's conduct.[14] Sun-Diamond contends that under the gratuity statute, the offender must give the thing of value in order to reward the official, in this case, Secretary Espy, for actions he had taken or was committed to take. Sun-Diamond avers that since the facts, as set forth in counts I and II, do not

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[14] Sun-Diamond does not maintain that the gratuity statute is, on its face, over broad. Such a challenge was rejected by the court in *Brewster*, 506 F.2d at 76-78.

contain such allegations, the gratuity statute cannot be read by the court as reaching Sun-Diamond's conduct. Sun-Diamond argues that absent this intent to reward a public official, the gratuity statute, as applied to Sun-Diamond's conduct, would be transformed from a general intent criminal statute to a strict liability one by punishing the mere provision of things of value to public officials.

The question of whether Sun-Diamond's reason for providing the gratuities to Secretary Espy was an innocent one and not motivated because of his official position is one that should be entertained by the jury. The gratuity statute does not require the government to prove specific intent, nor does it require proof of a *quid pro quo*. *See Baird*, 29 F.3d at 652 (citing *Brewster*, 506 F.2d at 72-74 n.26). As previously discussed by the court, the OIC is not required to show that Sun-Diamond intended to reward Secretary Espy for actions he had undertaken or had committed himself to undertake.

The gratuity statute requires that the gratuities be given to an appointed official "for or because of official acts" performed or to be performed by the appointed official. Consequently, to find Sun-Diamond guilty under the gratuity statute, the jury needs only to conclude that Sun-Diamond provided the gratuities to Secretary Espy because of his status as an appointed official; and not merely for innocent reasons, such as friendship.[15] In other words, the OIC must demonstrate that Sun-Diamond knew that it was providing the gifts to Secretary Espy not solely for the sake of friendship, or some other innocent reason, but instead, because of Secretary

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[15] In *Standefer*, the court, in determining whether the defendant had been properly convicted of receiving illegal gratuities, stated:

> All that was required in order to convict [the defendant] was that the jury conclude that the gifts were given by him for or because of [the government official's] official position, and not solely for reasons of friendship or social purposes.

610 F.2d at 1080.

Espy's position.[16] The language of the statute and the cases that interpret it provided Sun-Diamond with sufficient notice of the prohibited conduct. As a result, the statute is not void for vagueness as it relates to Sun-Diamond's purported conduct. Accordingly, Sun-Diamond's motion to dismiss counts I and II based on this ground is denied.

D. The Independent Counsel's Jurisdiction

1. Introduction

Sun-Diamond moves this court to dismiss counts III through IX of the indictment on the basis that the violations alleged therein are outside the scope of the Independent Counsel's jurisdiction. Sun-Diamond maintains that the allegations in counts III through IX do not pertain to the subject matter of the Independent Counsel's investigation, namely, the alleged acceptance of improper gratuities by Secretary Espy. Sun-Diamond argues that because counts III through IX do not specifically relate to the subject of gratuities, the Independent Counsel exceeded his jurisdiction. Sun-Diamond contends that the Independent Counsel could only have referred the allegations set forth in counts III through IX to the Department of Justice for its consideration, or in the alternative, sought a referral from the Attorney General or Special Division over the allegations of wrongdoing contained in those counts. According to Sun-Diamond, since the OIC did not pursue either of these options, it exceeded its jurisdiction. The court, however, concludes that the Independent Counsel did not exceed its jurisdiction because the allegations set forth in counts III through IX are related to the core subject matter of the OIC's

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[16] The statute does not, as Sun-Diamond contends, criminalize all things of value that are provided to appointed officials without regard as to the reason. The OIC must establish that Sun-Diamond provided improper gratuities to Secretary Espy *because* of his status as an appointed official.

investigation and thus fall properly within the Independent Counsel's jurisdiction.[17]

2. Analysis

Counts III through IX of the indictment allege that Sun-Diamond made illegal campaign contributions to the congressional election campaign of Secretary Espy's brother, Henry Espy. Specifically, the indictment alleges that as a result of Henry Espy's unsuccessful campaign for the Democratic Party nomination to the seat vacated by his brother when he became Agriculture Secretary, Henry Espy incurred campaign debts. To help retire these debts, the indictment alleges that Mr. Douglas, at the time a Senior Vice-president of Sun-Diamond and James H. Lake, a principal of the D.C. public relations firm of Robinson-Lake, together devised a scheme to enable Sun-Diamond to make unlawful corporate contributions in the name of another. To effectuate this contribution, the indictment alleges that Mr. Douglas and Mr. Lake agreed that Mr. Lake would obtain $1,000 contribution checks from several Robinson-Lake employees. Robinson-Lake then invoiced Sun-Diamond for a false and fictitious expense sufficient to cover the contributions. Sun-Diamond's payment of the false expense was purportedly used to reimburse the individuals making the campaign contributions.

The Ethics in Government Act, 28 U.S.C. § 591, *et. seq.*, authorizes the Attorney General to investigate high-ranking federal executive officials, national campaign committee officials, or persons who present a personal, financial, or political conflict of interest to the Executive Branch. *Id.* at §§ 591(b) and (c). These persons are referred to as "covered persons," because they are explicitly covered by the Act. *See United States v. Tucker*, 78

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[17] The court notes that the jurisdiction of the Independent Counsel has inspired extensive treatment. Specifically, "the jurisdiction of the Independent Counsel . . . has already been tested in district court by forty- three motions." *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

F.3d 1313, 1322 (8th Cir.1996). Under the Act, the Attorney General, "upon completion of a preliminary investigation," may apply to the Special Division for the appointment of an independent counsel. 28 U.S.C. § 591(c)(1)(A). In the application, the Attorney General is to provide "sufficient information to assist the division of the court . . . in defining [the] independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter." *Id.* at § 592(c).

The Special Division, in delineating the independent counsel's prosecutorial jurisdiction, must "assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of counsel, and all matters related to that subject matter." *Id.* at § 593(b)(3). The independent counsel is also to have the jurisdiction to investigate and prosecute crimes that "may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made . . ." *Id.*

On August 8, 1994, the Attorney General submitted an application to the Special Division for the appointment of an independent counsel, "to investigate whether any violations of federal criminal law were committed by Secretary of Agriculture" Espy. *In re Alphonso Michael (Mike) Espy*, Application for Appointment of an Independent Counsel, No. 94-2, at 1 (Aug. 8, 1994). The Attorney General's preliminary investigation developed evidence that Secretary Espy had received gifts from Tysons Foods, a major poultry processing corporation headquartered in Arkansas, with a number of pending regulatory issues before the Department of Agriculture. *Id.* at 2. In addition, the Attorney General concluded that Secretary Espy allegedly received gifts from other organizations and individuals with business matters pending before the Department of Agriculture. *Id.*

On September 9, 1994, the Special Division, pursuant to 28 U.S.C. § 593(b), appointed Donald C. Smaltz Independent Counsel to investigate

> to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether [Secretary Espy] has committed a violation of any federal criminal law . . . relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

In re Alphonso Michael (Mike) Espy, Div. 94-2, Order at 1-2 (D.C. Cir. Sp. Div. Sept. 9, 1994).

The Special Division further vested the Independent Counsel with authority to investigate

> other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation.

Id. at 2. The Independent Counsel was also given the authority

> to seek indictments and prosecute any organization or individuals involved in any of the matters [outlined in the order], who are reasonably believed to have committed a violation of any federal law arising of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

Id. Finally, the Independent Counsel was to

> . . . fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel . . . and all matters

> and individuals whose acts may be related to that subject matter . . .

Id. at 3.

On September 14, 1994, after the appointment of the Independent Counsel, the Attorney General referred to him a related matter under 28 U.S.C. § 594(e). The referred matter was the allegation that "Secretary Espy hosted a fundraising dinner, attended by agricultural lobbyists, the purpose of which was to retire the campaign debt of his brother." *Notice of Prosecutorial Jurisdiction*, at 2.

The issue before the court is whether the allegations set forth in counts III through IX are related to the subject matter originally identified by the Attorney General in its application for the appointment of an independent counsel or in the subsequent referral. Preliminarily, the court notes that the OIC is not limited in its investigation to those persons that are explicitly covered by the Act. *Tucker*, 78 F.3d at 1322. The important issue is whether the persons or organizations and the matters being pursued by the OIC are related to the original subject matter of the OIC's investigation. "To demonstrate that one occurrence is 'related' to another, [the OIC] need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between events." *Secord*, 725 F.Supp. at 566.

The court concludes that the Independent Counsel has not exceeded his jurisdictional mandate because the counts in question are related to the original subject matter of the investigation. In essence, counts III through IX charge that Sun-Diamond sought to gain improper influence with Secretary Espy by providing money to help retire Henry Espy's campaign debt.[18] This factual predicate is intertwined

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[18] Indeed, Mr. Lake, who has entered a guilty plea before this court, admitted at the plea proceeding that Mr. Douglas advised him that Secretary Espy desired the help of Mr. Douglas in raising money to help retire Henry Espy's campaign debt. The Attorney General's September 14, 1994, referral also dealt with

with the original core subject matter of the Attorney General's investigation, as well as the subsequent related referral dealing with the allegations that Secretary Espy hosted a fundraising dinner to help retire his brother's campaign debt. The Attorney General's original investigation and request for appointment sought to determine whether certain individuals or organizations with business matters pending before the Agriculture Department improperly influenced Secretary Espy. "Obviously, the concern motivating such an investigation is that a cabinet Secretary may have been influenced improperly to favor or intervene in the gift-givers' causes pending before his or her Department." *In re Espy*, 80 F.3d 501, 508 (D.C. Cir.1996). Similarly, the allegations of counts III through IX present the alleged scenario that Secretary Espy was improperly influenced because of his status by individuals or organizations with matters before the Department of Agriculture. The court's conclusion is supported by *In re Espy* and *United States v. Tucker*, 78 F.3d 1313 (8th Cir.1996).[19]

Secretary Espy's effort to retire his brother's campaign debt. The scheme that Mr. Lake and Mr. Douglas allegedly entered into is therefore closely related to the subject matter of the referral. Importantly, the referral does not include a reference to any gratuity. This fact undermines Sun-Diamond's argument that count III through IX do not mention the subject of gratuities, and as such, the allegations contained therein are beyond the OIC's jurisdiction.

[19] Although these two cases involved the issue of referral, they are nevertheless directly applicable to this case. This is so because this court faces the same task the courts in those cases encountered. Namely, the court must interpret the independent counsel's original grant of prosecutorial jurisdiction. As the court in *In re Espy* stated:

> In referring a relating matter, this court is *interpreting*, but not expanding, the independent counsel's jurisdiction over a matter that was implicitly included in the original grant of prosecutorial jurisdiction, thus permitting the court to make explicit the independent counsel's jurisdiction over a matter that was implicitly included in the original grant of prosecutorial jurisdiction.

In re Espy, the independent counsel, Donald C. Smaltz, sought a referral of a related matter under section 594(e) of the Ethics in Government Act. He sought a referral over-alleged "violations of federal criminal law by associates of Secretary Espy in matters related to the original grant of jurisdiction wherein the persons involved, patterns of conduct, witnesses, underlying facts, and applicable law overlap with" his original investigation. *Id.* at 503-504. The court granted the application for referral, noting that the independent counsel had

> identified evidence allegedly showing a pattern of conduct involving payment or gifts to Espy *and his close associates* in return for favorable treatment by the Department of Agriculture, which was developed during the [Independent Counsel's] original investigation of Secretary Espy's acceptance of gifts from parties with business pending before the Department of Agriculture[.][20]

Id. at 507 (emphasis added). This is precisely the same task this court has endeavored to meet.

[20] The referral order in In re Espy demonstrates to this court the expansive reading of the Independent Counsel's jurisdiction given by the Special Division. The Special Division referred the following matter to the Independent Counsel pursuant to 28 U.S.C. § 594(c):

> The jurisdiction and authority to investigate and prosecute any violation of any federal law . . . by any organization or individual, related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

In re Alphonso Michael (Mike) Espy, Div. 94-2, Order at 1 (D.C. Cir. Sp. Div. April 1, 1996).

The order does not contain a specific mention of any unlawful gratuity made directly to Secretary Espy. This fact also undermines Sun-Diamond's argument that because counts III through IX do not

Id. at 509.[21] Similarly, counts III through IX allege that Sun-Diamond engaged in a pattern of unlawful conduct that sought to benefit one of Secretary Espy's closest associates, his brother. In addition, the OIC has presented evidence that Secretary Espy was actively involved in soliciting contributions to retire his brother's campaign debt.[22]

In *United States v. Tucker*, the court also recognized the broad nature of an independent counsel's jurisdiction. In that case, the Independent Counsel was originally vested with jurisdiction to investigate the relationship of the President of the United States and the First Lady to a savings and loan association and a land development corporation. The issue before the court was to determine the propriety of a referral to the Independent Counsel. The referral sought to grant the Independent Counsel with jurisdiction to investigate another separate, corporation. As a result of the referral, the governor of Arkansas, his attorney, and the governor's business partner were indicted. The indictment was the subject of the appeal.

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specifically allege that it gave Secretary Espy an improper gratuity, the OIC exceeded its jurisdiction.

[21] The court rejected the Department of Justice's arguments against referral. The Department of Justice's position was similar to the one presently taken by Sun-Diamond. It contended that the matter for which the independent counsel sought referral was not sufficiently related to his original prosecutorial jurisdiction

> because the connection between the alleged wrongdoing by Secretary Espy's associates and the improper acceptance of gifts by Espy [was] too speculative . . . The proper course in [the Department of Justice's] view [was] for IC Smaltz to allow [it] to investigate the new matters and determine whether to prosecute any federal offense it may discover.

Id. at 508. This is analogous to the argument presently proffered by Sun-Diamond.

[22] Specifically, at Mr. Lake's guilty plea proceeding, the government's statement of facts (with which Mr. Lake agreed) stated that Mr. Douglas had told Mr. Lake that Secretary Espy wanted help in raising money to retire Henry Espy's campaign debt.

The court concluded that the referral was appropriate because it was sufficiently related to the Independent Counsel's original jurisdiction. The court so concluded because there was an overlap in the defendants and in the witnesses between the original prosecutorial jurisdiction and the referral jurisdiction. *Id.* at 1321. In addition, there was a defined relationship between the defendants. *Id.*

The *Tucker* court's reasoning is particularly applicable to this case.[23] In this case, the connection between the allegations set forth in counts III through IX and the subject matter of the independent counsel's original grant of jurisdiction is at a minimum as strong as the connection found by the court in *Tucker*. Counts I and II, which Sun-Diamond concedes fall within the OIC's original jurisdiction, involve perhaps the most important individual in the case, Mr. Douglas, the same individual that counts III through IX implicate. Moreover, there is a clearly defined relationship between Mr. Douglas and Secretary Espy alleged by all counts. Consequently, the court concludes that counts III through IX fall within the purview of the OIC's jurisdiction. Sun-Diamond's motion to dismiss counts III through IX of the indictment is therefore denied.

E. Wire Fraud

Sun-Diamond moves the court to dismiss count III of the indictment (wire fraud) because the alleged wire communication at issue did not further the execution of the alleged scheme that Mr. Douglas and Mr. Lake pursued. Count III alleges, in pertinent part, that:

> Defendant Sun-Diamond, acting through its Senior Corporate Officer [Richard Douglas], for the purpose of executing the aforesaid scheme and

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[23] Importantly, our court of appeals, in *In re Espy*, adopted the *Tucker* court's approach in determining whether two matters were related. *In re Espy*, 80 F.3d at 507.

> artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted in interstate commerce, by means of a wire communication, that is: a telephone call between [Mr. Douglas] and James H. Lake's office. . . in the District of Columbia, writings, signs, signals, pictures and sounds, that is among other things, a message that [Mr. Douglas] needed to speak with James H. Lake.[24]

The court must determine the sufficiency of a criminal indictment by examining the indictment on its face. *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir.1992). "The indictment is sufficient if it charges in the language of the [applicable] statute." *Id.*[25] The indictment must, however, set forth the essential elements of the alleged crime. *United States v. Cole*, 755 F.2d 748, 759 (11th Cir.1985). Presently, wire fraud requires proof of a scheme to defraud and the use of an interstate wire communication to further this scheme. *United States v. Maxwell*, 920 F.2d 1028, 1035 (D.C. Cir.1990).

In count III of the indictment, the OIC has sufficiently identified the elements of the charged offense. The sufficiency of the evidence is a matter to be left for the trial.

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[24] Count III refers to an illegal scheme allegedly devised by Mr. Douglas and Mr. Lake to enable Sun-Diamond to make unlawful corporate contribution to help retire Henry Espy's campaign debt.

[25] The wire fraud statute states, in pertinent part,

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (West Supp.1996).

See Critzer, 951 F.2d at 307.[26] At trial, the OIC will have to establish that the use of the wire advanced or was integral to the execution of the fraud. *United States v. Vontsteen*, 872 F.2d 626, 629 (5th Cir.1989), *cert. denied*, 498 U.S. 1074, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991). The government will have to establish that the wire communication was at a minimum "incident[al] to an essential part of the scheme." *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954) (elements of mail fraud).[27] The indictment, however, only need inform the defendant of the charge against him/her and enable the defendant to plead double jeopardy in any subsequent prosecution for the same offense. *Critzer*, 951 F.2d at 307. Count III of the indictment identifies the essential elements of the charged offense and provides Sun-Diamond with the requisite notice. Accordingly, Sun-Diamond's motion to dismiss count III is denied.

F. Intangible Right to Honest Services

Lastly, Sun-Diamond moves the court to dismiss, or in the alternative strike, the part of counts III and IV of the indictment that allege that Mr. Douglas and Mr. Lake sought to defraud both Robinson-Lake and Bozell Worldwide, Inc. of the intangible right to Mr. Lake's honest services.[28] Sun-Diamond maintains that count III and IV fail to allege that Mr. Douglas and Mr. Lake intended to cause Robinson-Lake

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[26] At trial, Sun-Diamond, can at the appropriate time, challenge the sufficiency of the evidence.

[27] The requisite elements of "scheme to defraud" under the wire fraud statute and the mail fraud statute are the same. Therefore, cases interpreting mail fraud apply equally to wire fraud. *United States v. Lemire*, 720 F.2d 1327, 1334-1335 n. 6 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984).

[28] Robinson-Lake was a wholly-owned subsidiary of Bozell Worldwide, Inc. which in turn is owned by Bozell, Jacobs, Kenyon & Eckhardt, Inc., a Delaware corporation.

and Bozell Worldwide, Inc. a concrete economic business injury.[29]

The wire fraud statute requires the indictment to allege that the defendant engaged in a "scheme or artifice to defraud . . . " 18 U.S.C. § 1343. A "scheme or artifice to defraud" is a "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Sun-Diamond argues that section 1343 requires that the alleged deprivation threaten or cause harm to the victim's pecuniary interests. In support of this proposition, Sun-Diamond principally relies on *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984). In *Lemire*, the court held that "an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute." *Id.* at 1337. The court found that to deprive another of the intangible right of honest services, the defendant's conduct must carry "a significant risk of identifiable harm to the employer apart from the loss of his employee's loyalty and fidelity." *Id.*

Lemire was decided prior to the enactment of section 1346.[30] The court there noted that "Congress had not defined

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[29] The indictment alleges that Mr. Douglas and Mr. Lake entered into a scheme to defraud Bozell Worldwide, Inc. of the intangible right of honest services of Mr. Lake by, among other things, creating a false expense report seeking reimbursement from Bozell Worldwide of money expended by Mr. Lake for the benefit of Sun-Diamond; falsifying financial records; and causing Bozell Worldwide to advance funds for the purpose of concealing an illegal corporate campaign contribution by Sun-Diamond to help retire Henry Espy's campaign debt.

[30] Section 1346 was enacted by Congress in November 1988 to overturn *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Court held that Section 1343 did not criminalize schemes to defraud citizens of their right to honest government. Section 1346 extended the applicability of "scheme or artifice to defraud" to include "a scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." Congress, in enacting Section 1346 wanted "to reinstate all the pre-*McNally* case law pertaining to the mail and wire fraud statutes without

'scheme or artifice to defraud' when it first coined that phrase." *Id.* at 1335. Congress, however, has since defined the term and the indictment tracks the statutory language with sufficient factual specificity. In addition, *Lemire* dealt with what the jury had to find in order to sustain a conviction under Section 1343; not with what an indictment must allege on its face.[31] The court was concerned that disloyalty alone would become an indictable crime. *Id.* at 1336. In the present case, however, the government has not indicated any intention to make such an argument.

The government has, however, indicated that it will prove at trial, consistent with Lemire, that both Robinson-Lake and Bozell, Inc. suffered identifiable harm. Specifically, counts III and IV allege a risk to the reputation of both entities and as a result, a risk to their continued business prosperity.[32] The OIC also intends to prove at trial that this risk was foreseeable to Mr. Douglas and Mr. Lake.[33] Counts III and IV adequately allege violations of Sections 1343 and 1346.

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change." Senate Judiciary Committee, Section Analysis of Anti-Drug Abuse Act of 1988, 134 Cong.Rec. S17, 360- 02 (daily ed. Nov. 10, 1988); *see also United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir.), *cert. denied*, — U.S. —, 116 S.Ct. 1350, 134 L.Ed.2d 519 (1996) ("Congress' purpose in enacting § 1346 was to restore the mail fraud statute to its pre-*McNally* position . . . ").

[31] Sun-Diamond has not presented the court with any authority that requires a count charging an offense under Section 1343 to include an allegation that the wrongdoer intend some economic harm.

[32] "[A]lthough the scheme to defraud must threaten some cognizable harm to its target, that harm need not be a deprivation of tangible property or money; criminal fraud encompasses schemes to defraud persons of significant intangibles as well." *Lemire*, 720 F.2d at 1336 (citations omitted).

[33] In *Lemire*, the court stated that "[s]o long as the jury finds [an intentional failure to disclose a conflict of interest] furthers a scheme to abuse the trust of an employer in a manner that makes an identifiable harm to him, apart from the breach itself, reasonably foreseeable, it may convict the employee of wire fraud." *Id.* at 1337.

Consequently, Sun-Diamond's motion to dismiss, or in the alternative to strike portions of counts III and IV, is denied.

III. Conclusion

For the foregoing reasons, it is this 7th day of September 1996,

ORDERED that Sun-Diamond's motion to dismiss be and is hereby **denied**.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

vs.

Sun-Diamond Growers of California, Defendant

Docket No. CR 96-0193 RMU
Washington, D.C.
Wednesday, September 18, 1996
9:21 a.m.

Volume 8
Transcript of Trial
Before the Honorable Ricardo M. Urbina
United States District Judge, and a jury

THE COURT: Ladies and Gentlemen, the time has now come when all of the evidence in the case is in and you will soon be hearing the closing arguments of counsel. It is now my responsibility to instruct you on the law that should control your deliberations in this case.

Let me begin by defining the functions of the various participants in this trial, but let me mention first, that you as jurors are the judges of the facts in this case, but in determining in what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the instructions of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction or to question the wisdom or the correctness of any rule I may state to you. You must not substitute or follow your own notions or opinions as to what the law is or ought to be. It is your duty to apply the law as I explain it to you regardless of the consequences.

Now, it is also your duty to base your verdicts solely upon the evidence without prejudice, without bias and without sympathy. That was the promise that you made and the oath that you took before being accepted by the parties as jurors and they have the right to expect nothing less.

Thus, under your oath as jurors, you are not to be swayed by prejudice or bias or sympathy. You are to be guided solely by the evidence in this case. It is for you alone to decide whether the government has proved that the defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I charge you now. It must be clear to you that once you let prejudice, bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

The parties in an action such as this are the government and the defendant. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until the defendant is proven guilty beyond a reasonable doubt.

The burden is on the government to prove the defendant guilty beyond a reasonable doubt. The burden of proof never shifts throughout the trial. This burden of proof requires that you look at the evidence carefully and thoughtfully and deliberately and the law does not require a defendant to prove his innocence or to produce any evidence in the case.

If you find that the government has proved beyond a reasonable doubt every element of an offense with which the defendant is charged, it is your duty to find the defendant guilty. On the other hand, if you find the government has failed to prove any element of an offense with which a defendant is charged, beyond a reasonable doubt, you must find the defendant not guilty.

Reasonable doubt as the name implies is a doubt based on reason. A doubt for which you can give a reason. It is such a doubt as would cause a juror after careful and candid

and impartial consideration of all of the evidence to be so undecided that he or she could not say that he or she has an abiding conviction of the defendant's guilt.

It is such a doubt as would cause a reasonable person to pause or hesitate in the graver or more important transactions of life. However, it is not a fanciful doubt nor is it a whimsical doubt nor a doubt based on conjecture. It is a doubt based on reason.

The government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

The parties, the government and the defendant, are represented by lawyers. The function of counsel is to shape the presentation of evidence for his or her respective client and to monitor the evidence as it comes into the case so that the lawyer can protect the legal rights of his or her client.

The statements and arguments of lawyers are not evidence. They are intended to assist you in understanding the evidence. If any reference by attorneys to evidence does not coincide with your recollection of the evidence, it is your memory, not the recollection of counsel, that will control during your deliberations.

Moreover, occasionally during arguments a lawyer for one side or the other may appear to be stating his or her beliefs or personal opinions concerning the facts in the case or the credibility of the witness or witnesses. Of course, this would be improper. Lawyers' personal beliefs or opinions have no place in the trial. They are not proper argument.

Rather counsel are permitted only to argue to you based upon what the evidence in the case has shown. If you think a lawyer comes to express his or her personal beliefs during an argument, you should disregard such expressions and judge the case only on the evidence.

Now, in the course of monitoring the evidence, the lawyers in the case may sometimes object when the other side has asked a question or made an argument or offered evidence which the objecting lawyer believes is not properly admissible.

You must not be prejudiced in any way against a lawyer who makes such objections. It is the lawyer's responsibility to make a judgment about when to make objections, and when counsel makes objections, he or she is doing so pursuant to the function that he or she performs.

Now, if such an objection has been made and I have sustained the objection made by counsel, that means that you disregard the question and you must not speculate as to what the answer might have been.

After a witness answer a lawyer's question, I have ruled that the answer should be stricken, you should disregard both the question and the answer in your deliberations. Likewise, as to exhibits, if I have sustained an objection or if I've ordered an exhibit stricken, then that means that it is not evidence in the case and you must not consider it as evidence in the case during your deliberations.

Now, the function of the court is to conduct the trial of the case in an orderly, fair and efficient manner. To rule on the questions of law that arise during the course of the trial and then to instruct you on the law which applies in the particular case.

The actions which I have taken during the trial in ruling on motions or objections by counsel, or in comments to the lawyers or in questions or comments to witnesses or even in setting forth the law in these or any other instructions I have given you, are not to be taken by you as any indication of my opinion as to the credibility of the witness or witnesses or how you should decide any particular fact or facts.

As I told you at the beginning of the trial, you may not take anything I might have said or done as indicating how I

think you should decide this case. If you believe that I have expressed or indicated any opinion about the facts, you should ignore it. It is your sole and exclusive function to decide the verdict in this case.

Like the lawyers, if any reference I have made to the evidence does not coincide with your memory of the evidence, it will be your memory, not mine that controls during your deliberations.

Now, your function, ladies and gentlemen, is to be the judges of the facts. You are to determine what the facts are in this case. You are the sole judges of the facts and in performing that function, you alone, will decide what weight to give to the evidence presented during this trial. You will decide the value of the evidence and the believability of every single witness who has appeared before you.

You should determine the facts in this case without prejudice, without fear, without sympathy or favoritism. You should not be improperly influenced by anyone's race, ethnic origin or gender. You will decide this case solely from a fair consideration of the evidence.

In the course of your deliberations on the facts, it is your duty to accept the law as I have stated it to you. You may not ignore any instruction or question the wisdom of any rule of law.

Now, the reason the parties, the lawyers, the judge and the jury come together in a trial is to consider the evidence in making a decision. Now, during their deliberations you may consider only the evidence properly admitted in this trial. The evidence in this case has consisted of sworn testimony of witnesses and exhibits which have been admitted into evidence. If during the trial I have sustained an objection to an exhibit as I indicated earlier, that exhibit is not evidence in the case.

Now, during your deliberations you may consider only the evidence which has been properly admitted in the trial and

that evidence, as I've indicated, has come in a number of forms in this case. One of the forms that evidence has been presented to you in is something called testimony stipulated to by the parties.

Now, during the trial you were that the parties had stipulated, that is, had agreed to certain facts. Any stipulation of fact is undisputed evidence, and you may consider it undisputed evidence.

Now, during the trial you were told as well that the parties had stipulated, that is agreed to, what testimony a particular witness would have given had that witness testified in the case. Now, you are to consider this stipulated testimony as exactly what this witness would have said had the witness actually testified.

When you consider the evidence, you are permitted to draw, from the facts, which you find have been proved, such reasonable inferences as you feel are justified in light of your own human experience.

There are two types of evidence from which you may find the facts of this case. There is direct evidence and there is circumstantial evidence.

Now, when a witness asserts actual knowledge of a fact such as an eye witness, that testimony is considered to be direct evidence of whatever it is the witness has observed. On the other hand, when there's been a chain of facts and circumstances which indicate the guilty or the innocence of the defendant that is called circumstantial evidence and the law makes no distinction between the weight you should give to either kind of evidence in this case.

For example, if you go home one evening and it is dry and cool and you go to bed and you wake up in the middle of the night and you look at the window and as you glance out the window and you see that it's raining, well, the next day that would be direct evidence of the fact that during the night hours, it rained. You saw it rain.

On the other hand, suppose you sleep through the night. You don't wake up and you wake up the next morning and it is not raining, but the streets are all wet, well, that may very well be circumstantial evidence of the fact that during the night hours while you slept, it rained, even though you did not see it rain. That would be circumstantial evidence.

Charts or summaries have been prepared by counsel and by the parties and shown to you during the trial of this case for the purpose of explaining facts that are allegedly contained, for example, in books and records and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact.

If you find that these charts or summaries do not correctly reflect facts or figure shown by the evidence in the case, the jury should disregard the charts or summaries. In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not in truth summaries or facts or figures shown by the evidence itself in the case, you can disregard them entirely.

Now, on the other had there have been some charts or summaries prepared by the parties in this case and by counsel that have been admitted into evidence and have been shown to you during the course of the trial for the purpose of explaining facts that are allegedly contained in books, records, other documents which are in evidence.

You may consider charts and summaries that have been admitted into evidence as you would any other evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give these charts and summaries such weight or importance, if any, as you feel they deserve.

Now the rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about issues in the case. Sometimes witnesses are permitted to give their own opinions about matters and

one of the exceptions is the exception that applies to the testimony of a person who is presented as an expert witness in the case.

Now an expert witness is someone who, by education or by experience, may have become knowledgeable in some technical, scientific or very specialized area. If such knowledge or experience may be of assistance to you in determining some of the evidence or in determining a fact, an expert witness in that area may state an opinion as to relevant and material matter in which that expert witness claims that he or she is an expert.

Now, you are not bound by the opinion of an expert. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider the evidence in this case.

If you should decide that the opinion of an expert witness is not based upon sufficient education or experience or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion is outweighed by other evidence, you may disregard the opinion in part or in its entirety. As I have mentioned repeatedly, you the jury, ladies and gentlemen, are the sole judges of the facts in this case.

Now in determining whether the government has established the charges against the defendant beyond a reasonable doubt, you must consider and weigh the testimony of all of the witnesses who have appeared before you including whatever representatives or persons claimed to be representatives of the defendant.

Now, you are the sole judge of the credibility of the witnesses in this case. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed. In reaching a conclusion as to the credibility of any witness, you may consider any matter that may have a bearing on the subject.

You may consider, for example, the demeanor and the behavior of the witness on the witness stand; the witness' manner of testifying; whether the witness impresses you as a truthful person; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for not telling the truth; whether the witness had a full opportunity to observe the matters about which he or she has testified; whether the witness has any interest in the outcome of the case, or friendship or animosity toward other persons concerned with the case.

Now, inconsistencies -- well, let me mention before I get into inconsistences, that you have heard the evidence that Mr. James H. Lake has made a plea agreement with the government. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves, whether or not his testimony may have been influenced by the plea agreement is for you to determine. The witness' guilty plea cannot be considered by you as evidence of the defendant's guilty. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness' testimony.

Persons characterized as accomplices in the commission of a crime are competent witnesses and the government has a right to use them as witnesses. An accomplice is anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another person in the commission of a crime regardless of his or her degree of participation.

The testimony of an alleged accomplice should be received with caution and scrutinize with care. You should give it such weight as in your judgment it is fairly and entitled to receive. You may convict the defendant upon the uncorroborated testimony of an alleged accomplice only if you believe that the testimony of the accomplice proves the guilt of the defendant beyond a reasonable doubt.

You also heard that witnesses or a witness in this case has received immunity. What this means that the testimony of a witness may not be used against that witness who has testified in a criminal case.

Now, you should consider whether testimony may be colored in such a way as to further the witness' own interests or a witness who realizes that he or she may obtain his or her own freedom by incriminating another has a motive to lie.

However, you may also consider that the witness is under the same obligation to tell the truth as is any other witness because the grant of immunity does not protect that witness against a prosecution for perjury or false statement he or she may make under oath.

Now, the testimony of a witness as to whom immunity has been granted should be received with caution and scrutinized with care. You should give the testimony such weight as in your judgment it is fairly entitled to receive.

Now, false or inconsistent statements that a defendant makes in explanation or defense, after a crime has been committed, do not create a presumption of guilt. You may consider evidence of such false or inconsistent statement, however, as tending to prove the defendant's consciousness of guilt, but you are not required to do so.

You should consider and weight evidence of the defendant's false or inconsistent statements, if any exists, with all of the other evidence in the case and then give it such weight as you believe it is fairly and entitled to receive.

A false and inconsistent statement must have been made by a Sun-Diamond officer, employee or agent acting in his or her capacity as such an officer, employee or agent.

Now, inconsistencies or discrepancies in the testimony of any witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like a

failure to recall, is not an uncommon experience. In weighing the effect of the inconsistency or the discrepancy, always consider whether it pertains to a matter of important or unimportant detail and whether the inconsistency or discrepancy results from innocent error or intentional falsehood.

In your consideration of the evidence, you are not limited solely to what you saw and heard as the witnesses testified or as exhibits were admitted into evidence. You may consider the reasonableness or unreasonableness, the probability or improbability, of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether the witness has been contradicted or corroborated by other credible evidence in the case.

Now, if you believe that any witness has shown him or herself to be biased for or prejudiced against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of that witness to tell the truth. Now, you should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

Now, the weight of the evidence, ladies and gentlemen, is not necessarily determined by the number of witnesses testifying for either side. Rather, you should consider all of the facts and circumstances in evidence to determine which of the witnesses you believe. You may find the testimony of a smaller number of witnesses on one side is more believable than the testimony of a greater number of witnesses on the other side or you may find to the contrary.

Turning now to the charges and a few general remarks. First, ladies and gentlemen, the indictment is merely a formal way of accusing a person of a crime so that that person may be brought to trial. You must not consider the indictment as evidence of any kind. You may not consider it as evidence of the defendant's guilt or draw any inferences of guilt simply because the defendant has been indicted.

Second, you must not allow the nature of the charge or charges to affect your verdict. You must consider only the evidence that has been presented in this case in rendering a fair and impartial verdict.

Now, as to the charges in the case, ladies and gentlemen, the defendant is charged in an indictment which I will discuss shortly. In order to prove the defendant guilty, the government must prove beyond a reasonable doubt all of the elements of the particular charge or charges that are contained within the indictment.

I'm going to now briefly summarize the counts in the indictment rather read the entire indictment to you and I will give you some general information and then some specific information. As you know, the indictment charges nine separate offenses called counts.

Now, a separate offense is charged in each count of the indictment which you will consider. Each offense and the evidence which applies to it should be considered separately and you should return separate verdicts as to each count, unless I otherwise instruct you.

The fact that you may find a defendant guilty or not guilty on any one count of the indictment should not control or influence your verdict with respect to any other count or counts in the indictment.

You will note when and if you review the indictment that the indictment charges offenses that were committed "on or about" January the 5th, 1993 through "on or about" June of 1994. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense were committed on a date reasonably near the date alleged.

You may consider, ladies and gentlemen, this case as I have instructed you and you may find the defendant guilty of the crime charged in a particular count or counts in the

indictment without finding that it personally, it, meaning the defendant, it personally committed each of the acts that make up the crime or that its officers, employees or agents were present while the crime was being committed.

Any person or company who, in some way, intentionally participates in the commission of a crime, aids and abets the principal offender. It, therefore, is as guilty of the crime as if it would be if its officers, employees or agents had personally committed each of the acts that make up the crime.

To find the defendant aided and abetted in committing the crime, you must find that the defendant knowingly associated itself with persons who committed the crime, that it participated the crime as something it wished to bring about and that it intended by its actions to make it succeed.

Some affirmative conduct by the defendant to help in the planning or carrying out the crime is necessary. The government is not required to prove that anyone discussed or agreed upon a specific time or method of committing the crime, nor need the government prove that the principal offender and the person or company alleged to be the aid or an abetter directly communicated with each other.

It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed or that it have intended to commit the particular crime committed by the principal offender.

An aider and abetter is legally responsible for the acts of other persons that are the natural and probable consequence of the crime in which it intentionally participates.

It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted the principal offender in committing the crime.

You may not draw any inference favorable or unfavorable towards the government or the defendant from the fact that any person was not named as a defendant in this

case or is not on trial before you at this time. Any such matter has no bearing upon our function as jurors.

Ladies and gentlemen, a corporation is a legal entity that may act only through its agents. The agents of a corporation are its officers, directors, employees and certain others who are authorized by the corporation to act for it.

A corporate defendant is entitled to the same individual and impartial consideration of the evidence that the jury gives to a personal defendant. A corporation may be found guilty of the offense charged or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

In order to sustain its burden of proof for the crime as charged in the indictment against the defendant, the government must prove to you beyond a reasonable doubt that each of the essential elements of the offense as given to you shortly was committed by an officer, director, employee or agent of the corporation.

In addition to the above, the government must also establish the following two elements beyond a reasonable doubt in order to sustain its burden of proof as to the defendant.

First, that each of the acts committed by the officer, director, employee or agent were within the course and scope of employment or agency given to the officer, director, employee or agent by the defendant.

And two, that the officer, director, employee or agent committed each of the essential elements or the offense with the intent to benefit the defendant.

Now, in order to establish that an act was committed or omitted within the course and scope of employment, the evidence must show that the act or omission related directly to the general duties that the officer, director, employee or agent was expected to perform by the defendant corporation. It is

not necessary for the government to prove that the act was authorized by the corporation formally or in writing.

An officer, director, employee or agent is not acting within the course and scope of his employment, however, if that person performs an act which the defendant has in good faith forbidden its officers, directors, employees or agents to perform. A corporate defendant like an individual defendant may not avoid responsibility for its action by meaningless or purely self-serving pronouncements. Similarly, a corporate defendant like an individual defendant may not be held responsible for acts which it tries to prevent.

Now, someone's intent and knowledge ordinarily cannot be proved directly because there is no way of directly looking into the workings of the human mind. But, you may infer the defendant's intent or knowledge from the surrounding circumstances. You may consider any statement made, or act done or omitted by the defendant, and all other facts and circumstances received in evidence which indicate the defendant's intent or knowledge. The defendant in this case is a corporation. Because corporations act through their agents, officers and employees, the knowledge of the corporation is considered to be collective knowledge of its agents, employees and officers formed in the pursuant of their corporate responsibilities.

In this case, if you determine beyond a reasonable doubt that Richard Douglas, Sun-Diamond's senior vice president for corporate affairs at the time, had the necessary knowledge and intent to commit a charged offense, that the intent may be attributed to Sun-Diamond Growers.

The defendant may also be to have harbored the knowledge and intent necessary to commit a crime, that is, to commit a criminal offense, if you determine beyond a reasonable doubt that Richard Douglas' knowledge and intent plus the knowledge and intent of other Sun-Diamond officers, directors, employees or agents considered as a whole had the knowledge and intent to commit a crime.

Finally, you may find that the defendant had the knowledge and intent to commit a crime, a criminal offense, if you find beyond a reasonable doubt that Sun-Diamond officers, directors, employees and agents other than Richard Douglas, individually or collectively, had the necessary knowledge and intent to commit the crime.

You may infer, but are not required to infer, that the person intends the natural and the probable consequences of acts done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during the trial.

You should consider all of the circumstances in evidence that you think are relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the necessary state of mind.

Now, let me tell you what the statutes say regarding the various offenses alleged by the government in this case and then I'll break them down into the counts that you will be considering in connection with this case.

Now, you've heard the term gratuity and illegal gratuity used throughout this trial. An illegal gratuity is a shorthand term for the conduct prohibited by the following statute.

In relevant part, the statute provides, "Whoever, otherwise than as provided by law for the proper discharge of official duties directly or indirectly, give, offers or promises anything of value to any public official for or because of any official act performed or to be performed by such public official or persons selected to be a public official shall be guilty of an offense against the United States."

Let me read that selection to you again. The language of the statute you are to consider is, ""Whoever offers or promises anything of value to any public official for or because of any official act performed or to be performed by such public official or persons selected to be a public official shall be guilty of an offense against the United States."

That is the statute that describes the offense generally termed illegal gratuity for a public official.

* * * * *

Now, that's the general language, that's the language of the statute which has application to various counts in this case, but I'll be more specific now and give you some more direct guidance on the counts and the elements of the offenses embraced by those counts.

Count One of the indictment charges that from on or about January the 5th, 1993 through on or about March the 11th, 1994, the defendant, Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, gave, offered or promised things of value including tennis tickets, meals, limousine services, luggage, a print and a crystal bowl to the Secretary of Agriculture, Michael Espy, for or because of official acts performed or to be performed by the Secretary of Agriculture, Michael Espy.

In Count Two of the indictment, the charge is that in or about May, 1993, Sun-Diamond Growers of California acting through Richard Douglas its senior vice president for public affairs, gave, offered or promised a thing of value, mainly approximately $3,100 and the benefit thereof, the companionship of his girlfriend, Patricia Dempsey, to Secretary of Agriculture, Michael Espy, for or because of official acts performed or to be performed by the Secretary of Agriculture, Michael Espy.

Now, to prove the offense of illegal gratuity, the government must prove that the defendant Sun-Diamond knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, for or because of his official position.

A gratuity is not the same thing as a bribe. The offense of illegal gratuity does not require the element of a quid pro

quo, the giving of one thing for another which is required to prove the offense of bribery, for example.

The crime does not require any exchange of promises between the public official and those alleged to have given him things of value. Nor, does it require that the gratuity be given or accepted in exchange for any specific official act. It is required, however, that the government prove that the gratuity was given because of the public official's position. The gratuity may be given in appreciation for their relationship or in anticipation of its continuation.

In addition, the government need not prove that the defendant gave, promised or offered the gratuity with intent to influence the public official. The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value because of his official position whether or not the giver or receiver intended that particular official's acts be influenced.

The fact that there might be dual purposes for the gift or payment or a valid purpose which partially motivates the transaction is not a defense to accepting or receiving any illegal gratuity.

The essence of the crime is the official's position of as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore the government, to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.

In order to sustain its burden of proof for the crime of giving, offering or promising anything of value to the Secretary of Agriculture as charged in Counts One and Two of the indictment, the government must prove each of the following three elements beyond a reasonable doubt:

First, at the time the gratuity was offered or promised, Michael Espy was a public official or selected to be a public official.

Second, that the defendant, Sun-Diamond Growers of California, acting through Richard Douglas, its then senior vice president for corporate affairs, knowingly and willingly gave, offered or promised something of value to Michael Espy otherwise than as provided by law for the proper discharge of official duty.

Third, the defendant Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, did so for or because of an official act performed or be performed by Michael Espy. I will define the term, official act separately.

Now, this statute does not require that Sun-Diamond gave the gratuities with the intent to influence Secretary Espy. It is sufficient if Sun-Diamond provided Espy with unauthorized compensation simply because he held public office.

Ladies and gentlemen, the term public official means an officer or employee or person acting for or on behalf of the United States or any department agency or branch of government in any official function. The term "selected to be a public official" includes any person who has been officially informed that he or she will be so nominated or appointed.

The parties have stipulated, and therefore I instruct you, that during the time periods alleged in Counts One and Two specifically between January the 5th, 1993 and March the 11th, 1994, Michael Espy was a public official or selected to be a public official, that is, Secretary of Agriculture.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in such official's official capacity on such official's place of trust or profit.

In considering the charges in Counts One and Two, it is not a defense that the actions taken, if any, by Secretary Michael Espy with respect to matters of concern to Sun-Diamond Growers of California were actually lawful, desirable or even beneficial to the public.

It is not a defense to the crime of providing an illegal gratuity to a public official for or because of an official act as charged in Counts I and Two of the indictment that Secretary Espy may not have had the authority, power or ability to affect matters that Sun-Diamond Growers had pending at USDA.

In other words, the government need not prove that the Secretary Espy or the Department of Agriculture was actually capable of providing some official act at the time the thing of value was given. Even if it would have been impossible for the Secretary of Agriculture Espy to have affected or influenced the outcome of matters that Sun-Diamond Growers of California had an interest in, a gratuity offense may still be committed if the government proves each of the necessary three elements of the offense beyond a reasonable doubt.

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy for or because of Mr. Espy's official government position and not solely for reasons of friendship or social purpose.

It is not a defense to providing an illegal gratuity to Michael Espy that Sun-Diamond Growers of California did not intend to influence Michael Espy at the Department of Agriculture to take any particular official action regarding, for example, methyl bromide or market promotion program's fund. It is, however, a defense to the charges contained in Counts One and Two that Sun-Diamond Growers of California did not provide a gratuity to Michael Espy for or because of his official position.

It is not a defense to the crime of providing an illegal gratuity to a public official as charged in Counts One and

Two of the indictment that Secretary Espy might have performed his duties in the same manner if he had not received the gratuity.

The term "for or because of an official act performed or to be performed" -- would you like for us to take a little break, ma'am?

THE COURT: Would you like us to take a little break?

JUROR: Yes.

THE COURT: We will stop for a few minutes and let you all get a drink of water, if you would like and we'll reconvene in five minutes. Please don't discuss the case. You can leave your pads and pencil in the chair.

We will take five minutes.

(Jury out at 10:36 a.m.]

* * * * *

(Jury in at 10:57 a.m.]

* * * * *

Now, the government must prove that the gratuity was knowingly and willing given for or because of an official act performed or to be performed by the Secretary of Agriculture, Michael Espy. That means that the government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and knowingly and willingly gave the gratuities, at least in part, because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.

The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all. In other words, the government need not prove that the gratuity was given as a quid pro quo, that is, in exchange for

any one specific action performed or to be performed by the Secretary. For example, the government need not prove that when Sun-Diamond gave Secretary Espy a thing of value on a particular date, that Secretary Espy took any particular official action or changed any particular official action with respect to matters pending before the USDA in which the defendant had an interest because of Espy's receipt of the thing of value.

The government also does not have to prove that there was any agreement between Sun-Diamond Growers of California and Secretary Espy regarding the giving or receiving of gratuities in exchange for the performance of any particular official act.

With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture.

The phrase, anything of value, means any item, whether tangible or intangible that the person giving or offering or the person demanding or receiving considers to be worth something. I instruct you that you may consider airplane tickets, tennis tickets, transportation, luggage, meals and intangible items such as the companionship of a friend as things of value.

* * * * *

All right, ladies and gentlemen, so what I've given you so far as far as the offenses are concerned, is that I talked to about generally about Counts One and Two. I've defined for you an illegal gratuity and I've given you certain facts that the government must prove in order to secure a conviction and I've given you those facts as they relate to the particular counts.

Then, I have given you the general and overall description of what the elements of the offenses are and how those elements are defined and how the terms within those

elements are defined. And that concludes more or less what you need to know about Counts Three and Four.

Now, I'm going to speak about Counts Five through Nine and that will conclude my description of the counts in the indictment, the elements that relate to them and the general information that you must have in order to listen intelligently to the arguments that are going to be made and then I will conclude before Mr. Greenberg begins his opening statement by being specific about what the theory of the defendant's case is.

* * * * *

Ladies and gentlemen, I'm going to speak to you now about the theory of the defendant's case and I will remind you, as I go through this recitation, that these statements represent the position that the defendant has taken. These statements represent the theory that the defendant's case takes and among the theories that the defendant through counsel will argue during closing arguments.

Now, the defendant maintains, with respect to Count One that the first, that is the first gratuity count, that the evidence establishes that Richard Douglas and Mike Espy were first and foremost friends who supported and cared about each other and trusted each other. That Richard Douglas and Sun-Diamond did not need to provide any gift to Mr. Espy in order to cultivate or to develop a relationship. The theory is that the relationship was already there.

The defendant claims with respect to these gifts that have been mentioned in the evidence such as the luggage and the other items, that the luggage was given, for example, to Mr. Espy as an honorarium for his speaking. It was not given to him as a gratuity as otherwise alleged.

The defendant asserts further that Sun-Diamond did not have any knowledge that Mr. Douglas purchased the tickets for the U.S. Open which in any event was, according to the

defense, a purely social event among friends and their girlfriends.

And the defendant further asserts as part of its theory that the picture frame was never given to Mr. Espy.

With respect to Count Two, the theory of the defendant's case is essentially that the gratuity relating to the trip to Greece, that is the trip to the conference, the International Nut Council or Congress, paid for the air fare for Secretary Espy's girlfriend to Greece, that no Sun-Diamond funds were used in this transaction and Mr. Douglas was contacted by the INC because he was Mr. Espy's close friend and not in order to exert any type of gratuity upon him or to impose any type of gratuity or to offer him any type of gratuity as the government alleges because of his official position.

* * * * *

THE COURT: Yes.

Ladies and gentlemen, that concludes the initial reading of the instructions. There will be a short block of instruction I will be giving you at the end. Mr. Greenberg and Mr. Hibey will be giving their closing arguments now.

(10)

Supreme Court, U.S.
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No. 98-131

In The

Supreme Court of the United States

October Term, 1997

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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42 pp

QUESTION PRESENTED

Whether the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), which renders unlawful the giving of anything of value to a public official "for or because of any official act performed or to be performed," criminalizes the giving of a thing of value to a public official where the gift is not motivated, caused by, connected or otherwise related to "any official act"?

PARTIES TO THE PROCEEDINGS

The Respondent Sun-Diamond Growers of California ("Sun-Diamond") is a California cooperative owned by four individual member cooperatives: Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, and Valley Fig Growers. Sun-Diamond has no nonwholly owned subsidiaries.

The Petitioner is the Independent Counsel on behalf of the United States of America.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Jurisdictional Statement	1
Statutory Provisions Involved	1
Statement of the Case	1
Summary of the Argument	4
Reasons for Denying the Writ	5
I. The Court of Appeals' Decision Does Not Create A Split In The Circuits On The Precise Issue Raised Here.	5
II. The Independent Counsel Misconstrues The Court's Decision In *Standefer v. United States*.	15
A. Standefer Did Not Address the Gratuity Issue Raised in this Case.	15

Page

B. The Court of Appeals' Holding Is Consistent with the Jury Instructions in Standefer. .. 18

III. This Case Does Not Concern An Important Federal Question Warranting Supreme Court Review. 21

IV. The Court of Appeals Correctly Interpreted The Gratuity Statute By Adhering To Its Express Language. 24

Conclusion 29

TABLE OF CITED AUTHORITIES

Cases Cited:

Darby v. Cisneros, 509 U.S. 137 (1993) 25

Standefer v. United States, 447 U.S. 10 (1980) 15, 16, 17, 18, 19, 20

Sullivan v. Stroop, 496 U.S. 478 (1990) 24

TVA v. Hill, 437 U.S. 153 (1978) 23

United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976) 6, 7, 9, 12

United States v. Barash, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969) 10

Page

United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) 9, 10

United States v. Brewster, 408 U.S. 501 (1972) 11, 24, 27, 28

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 11

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United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982) 28

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United States v. Evans, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978) ..... 12 ,13, 14

United States v. Gatling, 96 F.3d 1511 (D.C. Cir. 1996) 28

United States v. Generes, 405 U.S. 93 (1972) 23, 24

United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987) 7, 8, 9

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) 8, 9

Page

United States v. Mariano, 983 F.2d 1150 (1st Cir. 1993) 27

United States v. Mezzanatto, 513 U.S. 196 (1995) 23

United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991) 27

United States v. Nardello, 393 U.S. 286 (1969) 28

United States v. Niederberger, 580 F.2d 63 (3d Cir.), *cert denied*, 439 U.S. 980 (1978) 10, 11, 12

United States v. Patel, 32 F.3d 340 (8th Cir. 1994) ... 27

United States v. Previte, 648 F.2d 73 (1st Cir. 1981) 27

United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) 22, 26, 27

United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (*in banc*) 11, 12

United States v. Strand, 574 F.2d 993 (9th Cir. 1978) 7, 9, 28

United States v. Umans, 368 F.2d 725 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967) 10

Watt v. Alaska, 451 U.S. 259 (1981) 23

Page

Statutes Cited:

2 U.S.C. § 437g(d)(1)(A) 2

2 U.S.C. § 441b(a) 2

2 U.S.C. § 441f 2

5 U.S.C. § 7353 23

18 U.S.C. § 2 ..... 2, 17

18 U.S.C. § 201 ..... 7, 16

18 U.S.C. § 201(a) 8

18 U.S.C. § 201(a)(3) 1, 24

18 U.S.C. § 201(b)(1)(A) 27

18 U.S.C. § 201(c)(1)(A) ..... i, 1

18 U.S.C. § 201(f) 6

18 U.S.C. § 203 25

18 U.S.C. § 1343 ..... 2, 21

18 U.S.C. § 1346 ..... 2, 21

28 U.S.C. § 593(b) 2

Page

Mass. Gen. Laws. ch. 268A, § 1(h) 26

Mass. Gen. Laws. ch. 268A, § 3(a) 26

Mass. Gen. Laws. ch. 268A, § 3(d) 26

Rules Cited:

Rule XXXV of the Standing Rules of the Senate (amended July 18, 1995) 23

Rule LII of the Rules of the House of Representatives (amended October 16, 1995) 23

Other Authorities Cited:

5 C.F.R. § 2635.202(a) 23

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Page

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APPENDIX

Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Dated March 20, 1998 ..... 1a

OPINIONS BELOW

The petition accurately reflects the opinions below. Copies of these opinions are located in the Appendix to the Petition for Writ of Certiorari ("Pet. App."). In addition, the Court of Appeals' Order dated July 17, 1998, amending the court's March 20, 1998, decision is attached hereto as Opposition Appendix A.

JURISDICTIONAL STATEMENT

The Court of Appeals' decision does not directly conflict with that of any other United States Court of Appeals or this Court. Nor does the petition otherwise raise an important federal question warranting this Court's discretionary review.

STATUTORY PROVISIONS INVOLVED

This controversy involves the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A) ("gratuity statute"), which provides in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned not more than two years, or both.

Congress specifically defined "official act" as

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

STATEMENT OF THE CASE

Sun-Diamond is a California agricultural cooperative owned by four individual member cooperatives,[1] which in turn are

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1. The Court of Appeals erroneously stated that Sun-Diamond is owned by five member cooperatives. *See* Pet. App. 1-2. One of the five member cooperatives has no ownership interest in Sun-Diamond.

collectively owned by approximately 5,000 individual growers. The conduct at issue stems from the relationship between Sun-Diamond's former Senior Vice President, Richard Douglas, and former Secretary of Agriculture Alphonso Michael Espy. As the Court of Appeals recognized, this relationship extended beyond business acquaintances. Pet. App. 2. Douglas "had a long-time friend in Mike Espy — the two had gone to college together at Howard University and had stayed close in the years since." *Id.*; *see also* Petition for Certiorari ("Pet.") at 3.

On June 13, 1996, a grand jury, acting at the behest of the Independent Counsel,[2] returned a nine-count indictment against Sun-Diamond. Counts I and II of the indictment charged that Sun-Diamond (through Douglas) gave approximately $9,000 in illegal gratuities to Espy. 18 U.S.C. §§ 2, 201(c)(1)(A).[3] Specifically, Count I — the only Count at issue in the petition— alleged that Sun-Diamond expended on Espy's behalf $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, $2,427 for luggage, $665 for meals, and $524 for a framed print and a crystal bowl. Pet. App. 4.

The indictment further alleged that two Department of Agriculture matters affected, among others, Sun-Diamond. Pet. App. 3-4. Noticeably absent from the indictment, however, was any allegation that the gifts were given to Espy "for or because of" either of these matters. Due to this deficiency, Sun-Diamond moved to dismiss Count I on the grounds that the gratuity statute — by prohibiting gifts to public officials "for or because of any official act performed or to be performed by such public official" — requires the prosecutor to allege and to prove some nexus between the alleged gratuities and the Department of Agriculture matters purportedly affecting Sun-Diamond. Pet. App. 38-51. In denying Sun-Diamond's motion, the District Court disregarded the "official act" language, concluding instead that

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2. On September 9, 1994, the Special Division for the Appointment of Independent Counsels appointed Donald C. Smaltz Independent Counsel to investigate alleged violations of the federal gratuity statute by Espy. *See* 28 U.S.C. § 593(b).

3. Counts III and IV alleged wire fraud. 18 U.S.C. §§ 2, 1343, 1346. Counts V through IX alleged illegal corporate campaign contributions in the name of another amounting to $4,000, in violation of the Federal Election Campaign Act. 2 U.S.C. §§ 441b(a), 441f, 437g(d)(1)(A); 18 U.S.C. § 2.

> it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided "simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation."

Pet. App. 42 (emphasis in original) (citation omitted).

Based upon this so-called "status gratuity" standard, the District Court instructed the jury that it could convict Sun-Diamond if the company gave things of value to Espy merely to "keep [him] happy," even if Sun-Diamond did not intend the gifts to relate in any way to any official act:

> *The essence of the crime is the official's position* of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*
>
> * * *
>
> It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*
>
> * * *
>
> In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.
>
> * * *
>
> [T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and

> knowingly and willingly gave the gratuities, as least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.*

Pet. App. 6-7 (emphases added by the Court of Appeals).[4]

On September 24, 1996, the jury found Sun-Diamond guilty of the crimes alleged in Counts I and III through IX, and acquitted Sun-Diamond of the gratuity allegation in Count II. Sun-Diamond appealed its convictions to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed and remanded Sun-Diamond's Count I gratuity conviction.[5] Pet. App. 31.

SUMMARY OF THE ARGUMENT

The issue raised in the petition does not warrant Supreme Court attention for three reasons. First, the Court of Appeals' decision is consistent with this Court's precedent, as well as with all other federal circuit court decisions that have addressed the gratuity statute. The out-of-circuit and Supreme Court precedent cited by the Independent Counsel either support the decision below or fail to address the precise question presented in the petition.

Second, given the relative dearth of gratuity cases, especially those specifically addressing the statute's "for or because of any official act language," the issue raised in the Independent Counsel's petition does not, at least at this time, involve an important federal question warranting Supreme Court attention. The Court of Appeals' decision, which does nothing more than resolve a jury instruction

4. The District Court rejected Sun-Diamond's proposed instruction that the "giving, offering, or promising things of value to Mike Espy unrelated to the performance of any official act is not prohibited by the gratuity statute." *See* Defendant's Proposed Jury Instructions to Which the Government Has Not Agreed at 33 (filed September 9, 1996).

5. The Court of Appeals also reversed Sun-Diamond's sentence but affirmed the convictions for the offenses alleged in Counts III through IX. *See* Pet. App. 14-31.

issue in connection with a fact-intensive prosecution, should be allowed to percolate through the Courts of Appeals before any Supreme Court intervention. Moreover, the Independent Counsel's policy concerns are addressed by other statutes, regulations or other sanctions and, in any event, involve matters that should be raised before Congress, not this Court.

Finally, the Court of Appeals' decision carefully addressed the question presented and supported its holding with a detailed and properly reasoned analysis. Despite the Independent Counsel's arguments to the contrary, the "for or because of any official act performed or to be performed" language means what it says and requires something more than a finding that gifts to a public official were for or because of the official's position. Moreover, the statute's legislative history and ample legal precedent support the Court of Appeals' conclusion that the prosecutor must prove a connection — *some* connection — between the thing of value given to a public official and an official act.

REASONS FOR DENYING THE WRIT

The Court of Appeals concluded that the federal gratuity statute — which requires a jury to find beyond a reasonable doubt that the defendant gave things of value to a public official "for or because of any official act performed or to be performed" — "means what it says." Pet. App. 12. This plain language requires some link, even if not an explicit *quid pro quo*, between the gift and an "official act." Accordingly, the Court of Appeals found that the District Court misinstructed the jury that Sun-Diamond violated the gratuity statute by giving a thing of value to Espy merely because of his position. *See* Pet. App. 10.

I.

THE COURT OF APPEALS' DECISION DOES NOT CREATE A SPLIT IN THE CIRCUITS ON THE PRECISE ISSUE RAISED HERE.

The Independent Counsel asserts that the Court of Appeals' decision conflicts with the decisions of other circuits.[6] But this

6. The Independent Counsel further contends that "the D.C. Circuit itself pointed to decisions from four other circuits that conflict with its decision in this case." Pet. at 12-13 (citing Pet. App. 11). But this is not the

(Cont'd)

assertion cannot withstand scrutiny, as authority from these circuits is either consistent with the Court of Appeals' decision or construes issues tangential to the one raised here.

Contrary to the Independent Counsel's spin of Ninth Circuit precedent, that Circuit has held, consistent with the Court of Appeals' decision below, that the gratuity statute renders unlawful the giving of gifts to a public official upon a showing of some nexus or connection between the alleged gift and some "act" or "decision." In *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976), the defendant was convicted for paying the vacation expenses of the administrator of the prison camp in which the defendant's father was incarcerated. After quoting the gratuity statute and the definition of "official act," the Ninth Circuit explained that the jury "could" have found that the gifts were given "for or because of" the official's "exercise" of his authority:

> To support the jury's verdict the evidence must show that something of value was given [to] "a public official . . . for or because of any official act performed or to be performed by such public official . . . ." 18 U.S.C. § 201(f).[7] An "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. § 201(a).
>
> * * * *
>
> The jury *could* fairly conclude from the record herein that things of value were given [to the camp administrator] by appellant "for or because of" [the administrator's] *exercise* of [his] authority; that is, "for or because of any official act performed or to be performed by" [the official].

(Cont'd)
case, as the Court of Appeals merely acknowledged that *the Independent Counsel* "points to" cases from other circuits "*apparently holding* that gifts motivated solely by the recipient's official position may be illegal gratuities." Pet. App. 11 (emphasis added) (citations omitted).

7. 18 U.S.C. § 201(f) is a predecessor gratuity statute.

Id. at 1082 (emphasis added). There exists a world of difference between one's authority and one's exercise of that authority. The Ninth Circuit required a finding of both: first, that the recipient had the authority to perform an official act, and second, that the gift was in fact provided because of the official's "exercise" of that authority, *i.e.*, by performing some "official act." As reflected by the word "could," the court left both of these fact questions to the jury. Because the District Court in the instant case required the jury to convict on materially less proof than that in *Alessio* — *i.e.*, without any evidence of some connection between any gift given to Espy and any official act — the Court of Appeals properly held that the District Court's instructions were deficient.

The Ninth Circuit's decision in *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978), also supports Sun-Diamond's position. *Strand* is a bribery case that explained the distinction between a bribe and an unlawful gratuity. The Independent Counsel omits from the petition a portion of the holding that renders *Strand* consistent with the decision below:

> The gratuity portions [of 18 U.S.C. § 201] require only that the thing of value be given or accepted "otherwise than as provided by law for the proper discharge of official duty," *thus covering instances where the public official would carry out the act or omission whether or not he received the thing of value.*

Id. at 995 n.2 (emphasis added); *compare* Pet. at 15. The emphasized language plainly denotes the Ninth Circuit's requirement that the gratuity statute requires a link between the gift and an "act or omission" that would have been performed (or not performed) regardless of the gift.

Nor does Sixth Circuit precedent conflict with that of the Court of Appeals below. In *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the defendant, an Assistant United States Attorney ("AUSA"), was convicted of accepting loans from an individual who would have benefitted financially from the defendant-AUSA's prosecution of a third party. The court first rejected the defendant's argument that the loans were not "things of value" because the defendant repaid them. Then the court — citing specific "official acts" for which the loans were given — found that the evidence was sufficient to prove that the

defendant received gratuities "for or because of any official act performed or to be performed by him." *Id.* at 1305. Specifically, "evidence was presented which showed that [the AUSA] repeatedly threatened [the giver of the gratuity] that his investigation of [a bankruptcy matter] would end if he did not receive the loans he requested." *Id.* Termination of an official investigation, of course, constitutes an "official act" as that term is defined in § 201(a). Most significantly, the jury was accorded the prerogative of determining whether the gift was "for or because of any official act performed or to be performed" rather than having that factual question determined by some irrebuttable presumption, *i.e.*, that a gift to an official who has authority over the giver *must necessarily* have been provided for or because of an "official act."

The Second Circuit cases cited by the Independent Counsel either support Sun-Diamond's position or are inapposite. First, *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), virtually mirrors the Court of Appeals' analysis when holding that the jury must find that the defendant gave the gifts to a public official with the intent to link the gift to an official act:

> [The federal gratuity statute] requires that the Government, to convict an accused, must prove that the purpose which he had in mind in making or promising to make a gift to a public official was to give additional compensation or a reward, gratuity or similar favor, *by reason of some "official act performed or to be performed by such public official."* It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anything to do with its nature or extent or the manner or means by which it was performed. *The making of the gift "for or because of any official act" limits the prohibition against the act of making a gift to a public official to those which are accompanied by and are made with this particular state of mind, design or purpose, which is the essence of intent.* Whether this is regarded as a specific intent or as a limitation on the acts that are within the purview of the subsection is of no consequence. *The state of mind with which the act is done is an essential element of the offense which the Government must prove.*

Id. at 197 (emphases added). In other words, the gift does not have to influence or cause the official act; rather, the gift merely needs to be made because of the official act. *See* Pet. App. 8 ("the gratuity statute by its terms does still require at least a unidirectional relationship — the gift must be 'for or because of' the act."). As the Second Circuit observed in *Irwin*, Congress enacted the gratuity statute *not* to felonize the giving of *all* gifts to government officials, but instead

> to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity *for or because of an official act already done or about to be done.*

Id. at 196 (emphasis added).[8] 354 F.2d at 198 n.3 (emphasis added) (quoting jury instructions). The Second Circuit in *Irwin*, like the Ninth Circuit in *Alessio* and *Strand*, and the Sixth Circuit in *Gorman*, far from representing a split among the circuits, reaffirms the very principles set forth in the Court of Appeals' decision.

Nor do the other cited Second Circuit cases conflict with the Court of Appeals' decision. The most recent Second Circuit case, *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989), devotes substantial effort to discern the proper scope of the term "official act." After quoting from the statute and noting that the term requires "any decision or action," the *Biaggi* Court rejected Congressman Biaggi's claim that the term was confined to only "legislative acts." *Id.* at 97. Accordingly, the Second Circuit concluded that his efforts on behalf of his constituent, Coastal Dry Dock and Repair Company ("Coastal"), regarding monies Coastal owed to the

8. The jury instructions considered in *Irwin*, in sharp contrast to the instructions in *Sun-Diamond*, specifically required a nexus between the gift and some official act:

> [T]his crime does not require the evil intent or the corrupt intent that the first crime [bribery] requires, nor does it have to have as a purpose the intent to influence the public official *but rather to have as a reason for the giving of the money the performance by the recipient of some official act, namely, the audit examination of the returns in question.*

354 F.2d at 198 n.3 (emphasis added) (quoting jury instructions).

Brooklyn Navy Yard Development Corporation, constituted "official acts." These acts included the Congressman *calling* the Deputy Mayor of New York on at least three occasions, *writing* to the Mayor at least twice, *calling* the Commander of the Coast Guard, and *calling* and *meeting* with a United States Senator. *Id.* at 92-94. The Second Circuit, finding that nothing in the law "precluded the jury from considering Biaggi's intercessions as official acts," affirmed the conviction. *Id.* at 98. In doing so, the court put to rest the question of whether there must be a link between the gift and an official act, finding that affirmance was appropriate "so long as, from the inferences reasonably drawn, the jury might fairly have found the *requisite connection* beyond a reasonable doubt." *Id.* at 99 (emphasis added).

The Independent Counsel's reliance upon other, older Second Circuit precedent is misplaced. *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967), merely held that a defendant may not be convicted of *both* an unlawful gratuity *and* bribery for the same conduct because a gratuity violation is a lesser included offense of bribery. *Id.* at 730. Moreover, *United States v. Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), is inapposite as it construed whether economic coercion is a defense to a gratuity violation. *Id.* at 29-30. No such defense was raised here.[9]

The Independent Counsel also cites to two Third Circuit cases, neither of which supports his position. In *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978), the court addressed the sufficiency of the allegations in the indictment; it did *not* address the propriety of jury instructions, which is the only issue raised in the Independent Counsel's petition. In any event, *Niederberger* actually supports the Court of Appeals' decision.

Niederberger, an Internal Revenue Service ("IRS") agent, was prosecuted for accepting golfing trips from a company he was in

9. Of course, to the extent *Umans* or *Barash* may be deemed to contain ambiguous language, the Second Circuit's position may be presumed to be found in its most recent articulation of the gratuity standard — that found in *Biaggi*, which was decided in 1989, more than 20 years after *Umans* and *Barash* were decided.

charge of auditing. After rejecting Niederberger's argument that the gratuity statute requires a *quid pro quo*, the Third Circuit explained that the statute nonetheless *does* require a nexus between the gift and an official act:

> What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, *for or because of any official act performed or to be performed by such public official, and* he was in a position to use his authority in a manner which could affect the gift-giver.

Id. at 69 (emphasis added).[10] The Independent Counsel relies upon the Third Circuit's requirement that the public official must be "in a position to use his authority in a manner which could affect the gift-giver" but ignores the fact that the court *also requires* that the gift be made "for or because of any official act performed or to be performed by such public official." The Independent Counsel thus attempts to re-write *Niederberger* by replacing the term "and" with an "or."

In *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979) (*in banc*),[11] a companion case to *Niederberger*, the Third Circuit accepted the case for *in banc* review to address a single issue:

> what effect, if any, should Niederberger's acquittal on three of the counts brought against him . . . have on Standefer's conviction for aiding and abetting Niederberger in committing the acts charged in those counts.

Id. at 1078, 1081. In the *"Facts"* section of the decision, the Third Circuit recapped — as nonbinding *dicta* — its holding in *Niederberger* that the gratuity statute "prohibits the giving or offering of gratuities to a public official *for the performance of an official act.*" *Id.* at 1079 (emphasis added). After distinguishing the bribery and gratuity statutes, the court expressed its opinion that sufficient evidence supported the

10. The Third Circuit relied upon the D.C. Circuit's decision in *Brewster*, which firmly supports the Court of Appeals' decision. 580 F.2d at 69 (citing *United States v. Brewster*, 506 F.2d 62, 72 n.26 (D.C. Cir. 1974)); *see also* Pet. App. 7-8.

11. *See* discussion *infra* at Part II for an explanation of this Court's decision in *Standefer*.

jury's finding that Standefer's gifts to Niederberger were "for or because of" Niederberger's *audit* of Standefer's company and not purely for reasons of friendship or social purposes. *Id.* at 1080-81. An audit, of course, constitutes an "official act" that properly supports a gratuity conviction.[12]

The Fifth Circuit's two gratuity cases cited by the Independent Counsel, while containing troubling language, do not address the precise issue raised in the petition. In *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978), Evans, an official with the Department of Health, Education and Welfare ("HEW"), was charged with accepting money and other compensation from individuals seeking government contracts with the HEW. Evans challenged the sufficiency of the evidence — not the District Court's instructions. Because the court chose not to quote, even in relevant part, from the jury instructions, the parties

12. The Independent Counsel relies upon *dictum* elsewhere in the "*Facts*" section in *Standefer* that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position. . . ." 610 F.2d at 1080. But the court gives no guidance as to what it meant by the phrase "official position." To be sure, if the court intended to establish a "for or because of the official's position" standard, it would have indicated that it disagreed with its interpretation of the gratuity statute reflected in *Niederberger*, which the court decided merely one year earlier. The Independent Counsel's interpretation of this statement also directly conflicts with *Standefer*'s holding that the gratuity statute "prohibits the giving or offering of gratuities to a public official for the performance of an official act." *Id.* at 1079. In addition, the District Court's decision on the gratuity issue — which the Third Circuit panel (the last court to address that issue) affirmed — specifically held that it

> was sufficient that the gratuities to which he was not legally entitled were given to [the official] in the course of his everyday duties for or because of official acts performed or to be performed by him *and* where he was in a position to use his authority in a manner which could affect the gift giver.

United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978) (emphasis added) (citing *Alessio*, 528 F.2d 1079). Finally, the jury was not instructed that it could convict Standefer under a status gratuity standard. Nor did Standefer challenge the gratuity jury instructions on that ground. *See* discussion *infra* at Part II.B.

and this Court are unable to compare the respective charges to determine whether a conflict might in fact exist.

The court also rejected Evan's argument that the government had to prove a *quid pro quo*, holding that Evans confused the standards for bribery and an unlawful gratuity:

> Evans sets up the proverbial "straw man" by searching the record for some evidence of *quid pro quo*: some evidence of an "official act," either in fact or the then present capability, on his part directly corresponding to the payment by [the giver of the gratuity]. . . . [The gratuity statute], in general, prohibit[s] the acceptance by a government official of any extraneous compensation or thing of value *for official conduct*. More specifically, it is not necessary that the official actually engage in identifiable conduct or misconduct nor that any specific *quid pro quo* be contemplated by the parties nor even that the official actually be capable of providing some official act as quid pro quo at the time.

Id. (emphasis added). This statement tracks the statutory language, correctly distinguishes the intent requirement of bribery from that of an unlawful gratuity violation and is consistent with the Court of Appeals' decision; "official conduct" merely is another phrase for "official acts." Although holding that the prosecutor need not prove a *quid pro quo*, *Evans* does not eviscerate the link under the gratuity statute between the gratuity and an official act. In fact, the existence of such a "link" does not appear to have been an issue on appeal. Accordingly, *Evans* is easily distinguishable.[13]

The Fifth Circuit's decision in *United States v. Bustamante*, 45 F.3d 933 (5th Cir.), *cert. denied*, 516 U.S. 973 (1995), which merely applies the reasoning of *Evans* to the conduct of an elected official, is similarly distinguishable. Bustamante was a United States

13. The *Evans* court found that the givers of the alleged unlawful gratuities "were actively trying to keep Evans 'happy' *while they contemplated seeking a government contract*. . . ." 572 F.2d at 481 (emphasis added). The evidence also reflected specific, official acts Evans performed on behalf of the givers of the gratuities. *Id.* at 481-42. Accordingly, the court held that *the jury* appropriately found that the gifts in *Evans* were given and received for or because of an official act.

Representative who allegedly accepted certain loan guarantees and an invitation to participate in a risk-free investment in a communications company so that Bustamante would "assist" the company — *i.e.*, take certain actions "in his official capacity" — to obtain a television station license from the Federal Communications Commission. *Id.* at 941.

As in *Evans*, the court rejected a sufficiency of the evidence challenge that "the government was required to prove that the gratuity was given in exchange for an official act" because that is the bribery — not the unlawful gratuity — standard. The appeal from the gratuity conviction was thus predicated upon whether there existed sufficient evidence from which a reasonable jury could convict, not whether the jury charge was proper. *Id.* Neither the Independent Counsel, Sun-Diamond nor this Court can determine whether the charge was sufficiently similar to, or different from, that given to the jury in the *Sun-Diamond* trial, or whether the instructions were consistent with or contradicted the Court of Appeals' decision.[14]

Accordingly, neither *Evans* nor *Bustamante* addresses the narrow issue of law presented here — whether, under the gratuity statute, a gift to a public official is deemed *as a matter of law* to be "for or because of any official act" merely if the gift was given for or because of the official's position. Nor do these cases — neither of which directly conflicts with the Court of Appeals' holding — present grounds for granting the Independent Counsel's petition.

In sum, all of the federal circuit decisions construing the gratuity statute are either consistent with the Court of Appeals' holding or fail to address the precise issue raised in the government's petition. Nor, as addressed in the next section, does the Court of Appeals' decision conflict with Supreme Court precedent.

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14. The Independent Counsel further misconstrues *Bustamante*'s holding that "the jury need not find that the official accepted the gratuity with the intent to be influenced" as supporting the Independent Counsel's position. *Id.* at 940; *see also* Pet. at 19. This statement is unremarkable as it describes a bribery violation.

II.

THE INDEPENDENT COUNSEL MISCONSTRUES THE COURT'S DECISION IN *STANDEFER V. UNITED STATES*.

That the Independent Counsel did not even cite to *Standefer v. United States*, 447 U.S. 10 (1980), until his petition for rehearing in the Court of Appeals is itself telling.[15] The Independent Counsel is not alone in having missed the purported holding of this Court; neither the Court of Appeals nor any other court has ever cited to the Court's decision in *Standefer* to support the criminalization of gratuities based solely on an official's position, despite the fact that *Standefer* has been around for nearly two decades. These omissions, however, are not without reasons as: (1) the Court did *not* address the "for or because of any official act" language in the gratuity statute; and (2) in any event, the instructions in *Standefer* support — rather than conflict with — the Court of Appeals' decision.

A. Standefer Did Not Address the Gratuity Issue Raised in this Case.

As discussed above, a jury convicted Standefer of aiding and abetting an IRS officer's acceptance of illegal gratuities in the form of paid trips and vacations. Niederberger was in charge of auditing the federal income tax returns of Standefer's employer, Gulf Oil Corp. ("Gulf"). Standefer argued that he could not be found guilty of aiding and abetting Niederberger's commission of those federal crimes because a jury acquitted Niederberger. *Id.* at 13-14. Standefer also asserted that the trial court improperly instructed the jury that "whether the [tax] returns of Gulf . . . were correct or not is not relevant to their deliberations in the case," thereby purportedly precluding Standefer from showing that he lacked the requisite criminal intent. *Standefer*, Petition for Writ of Certiorari at 4.[16] The District Court disagreed with Standefer, and the Third Circuit affirmed the conviction.

In his Petition for Writ of Certiorari, Standefer raised *only* the following issues:

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15. Even the Independent Counsel acknowledges the weakness of this argument when asserting that "the D.C. Circuit's decision is *arguably* inconsistent with a prior decision of this Court." Pet. at 24 (emphasis added).

16. Page citations are to the version of this document available through LEXIS. *See* Pet. at 25 n.13.

1. Can a defendant be convicted of aiding and abetting a principal when the only named principal, who must be an employee of the Government of the United States to have committed the substantive offense, has been acquitted by a jury of committing the substantive offense of which the aider and abetter is charged

2. Does not the interpretation of the *aider and abetter statute* by the court below create a new substantive crime which Congress never intended by:

> a) allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted;
>
> b) eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting;
>
> c) allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

Id. at 3-4 (emphasis added). Standefer did not even cite to 18 U.S.C. § 201 as one of the "Federal Statutes and Federal Issues Involved." *Id.* at 3. And nowhere in his petition did Standefer seek Supreme Court review on the question of whether the government must prove that the defendant intended to influence or reward an official act; indeed, he could not have because the instructions actually required a nexus between the gift and an official act. *See infra*, n.19-20. Nor did the Court take up or address this issue. Instead, the Court

> granted certiorari in this case to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense.

Standefer, 447 U.S. at 11.

The Independent Counsel's heavy reliance upon a two-sentence footnote in the Court's *Standefer* decision is misplaced. The Court

noted that the "Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct." *Id.* at 14 n.8. To be sure, however, this Court's *dictum* did not intend to bless every word of the instructions.

Standefer's challenge to the jury instructions on criminal intent simply did not turn on the "for or because of any official act" language of the gratuity statute. Instead, Standefer's challenge turned on the relationship between the aiding and abetting statute, 18 U.S.C. § 2, and the gratuity statute. More specifically, Standefer raised two challenges to the jury instructions on criminal intent: (1) the trial court did not obligate the government to show an agreement between Standefer and Niederberger that Niederberger would commit "an official act," which Standefer argued was required by the aiding and abetting statute; and (2) the trial court precluded the jury from taking into consideration in determining Standefer's intent the alleged facts that the audits conducted by Niederberger were correct and that Gulf paid more than $150 million in taxes as a result of those audits. Brief for Petitioner at 8, 10; *see* comment *supra*, note 16.[17]

In contrast, Sun-Diamond has never argued that the Independent Counsel was required to show either an *agreement* between Espy and Sun-Diamond or that Espy was influenced in any way as a result of the

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17. In his principal brief, Standefer argued:

> The definitions of aid and abet all necessarily convey the fact that two persons must act in preconcert with an agreement as to their purpose. The court, on the other hand, charged the jury:
>
> ". . . it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him for or because of an official act performed or to be performed by him in the course of his duty."
>
> * * * *
>
> The court had taken from the jury the crucial fact of the defense that every audit that was performed was performed properly. . . . The argument made to the trial judge that the correctness of the audits was a fact to be weighed by a jury and was a factual determination on a highly important element of whether or not in fact there was a crime committed.

Brief for Petitioner at 8, 10.

gifts. Because the District Court in *Standefer* never dispensed with the "for or because of an official act" language in the jury's instructions, as the District Court did here, that issue was never raised in *Standefer* — at either the District Court, the court of appeals or this Court.

It is thus no surprise that the Court of Appeals, in denying the Independent Counsel's petition for rehearing, confirmed Sun-Diamond's position that *Standefer* has no bearing upon the issues in this case:

> Standefer's briefs in the Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir. 1979), . . . make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8.

Pet. App. 11 n.5. Because the parties to *Standefer* did not seek Supreme Court review on the proper construction of the statute's "for or because of any official act" language, this Court did not address, and could not have addressed, the issue presented by the Independent Counsel here.

B. The Court of Appeals' Holding Is Consistent with the Jury Instructions in Standefer.

In any event, the *Standefer* District Court instructions more closely parallel the Court of Appeals' than the Independent Counsel's interpretation of the gratuity statute. As these instructions make clear, the jury was required to find that the gifts (paid vacations) were motivated by a desire to reward some past *official act* (favorable tax audits). The District Court specifically instructed the jury that:

> It is sufficient if the defendant made these payments because of [a] desire to create a better atmosphere with Niederberger *with respect to the performance of the audit or appreciation for a speedy or favorable audit.*

Instructions at 16-17.[18] Payments for a "better atmosphere" were insufficient; instead, the District Court required a nexus to a specific

18. The "Instructions" page citations refer to the jury charge found in the *Standefer* Appendix filed with this Court and available in LEXIS. *See* Pet. at 25 n.13.

act. And even a casual reading of the jury's instructions in *Standefer* shows repeated references to this requirement in the body of the instructions, *see* Instructions at 15-20,[19] two supplemental instructions, *id.* at 28-29 (defendant's requested instructions Nos. 7 and 8), and an answer by the District Court to a jury question,

19. The jury instructions in *Standefer* included the following:

> Now you will see, therefore, that the essential elements of this offense which must be proved by the government beyond a reasonable doubt are . . . third, that the defendant did give, offer or promise anything of value to him *for or because of an official act performed or to be performed by him*; . . . and fifth, that such gift was with the purpose of giving a thing of value *for or by reason of the official act performed or to be performed by him.* . . . [Instructions at 15-16]
>
> It is important for you to understand that in order to find this defendant guilty of giving, offering or promising anything of value to Agent Niederberger *for or because of any official act performed or to be performed by him.* . . . [t]he evidence . . . must show to your satisfaction beyond a reasonable doubt that the defendant gave something of value to a public official *for or because of any official act performed or to be performed by such official.* [*Id.* at 16]
>
> * * *
>
> I will also say to you it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him *for or because of an official act performed or to be performed by him* in the course of his duty. [*Id.* at 17]
>
> Thus the government must prove to you beyond a reasonable doubt as to these 201(f) charges that the defendant willfully and knowingly . . . gave something of value to the agent *because of official acts performed or to be performed by the agent.* . . . [*Id.* at 18]
>
> I must say to you, however, that if on the other hand these acts in making these gifts to Niederberger had nothing to do with giving of things of value to a public official *for performance of acts to be performed by him*, but on the contrary, as contended by the defendant, these things were given as a matter of friendship or for social purpose only, then you should acquit the defendant. [*Id.* at 18-19]

(Emphases added.)

id. at 46-50 ("it is necessary that you find that the defendant did intend to give gratuities . . . for the purpose or because of an official act").

A thorough reading of these instructions finds none that permitted the jury to convict on the Independent Counsel's theory in this case that gifts motivated solely by an official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or to reward official acts.[20] As the Court of Appeals observed:

> [T]he instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

Pet. App. 11 n.5.

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20. The closest the District Court in *Standefer* came to the Independent Counsel's proposed instruction was as follows:

> If you conclude beyond a reasonable doubt that the vacations . . . were given to Niederberger, knowing that he was in a position to use his authority in a manner which would affect the conditions of the audit, then you *could* find that the things of value were given to him because of Niederberger's exercise of his authority, that is, *for or because of any official act performed or to be performed.* [Instructions at 17]

(Emphases added.) The district court below substituted the word "must" for "could." Sun-Diamond does not contest (and has never contested) that a jury is free to infer based on the authority of a donee that gifts made to him were — or were not — "for or because of any official act." In the instant case, however, the jury was *not* free to reach its own conclusion. Instead, the jury was instructed that the giving of a gift to Secretary Espy was unlawful so long as the gift was motivated by his position — even if there was no intent to influence or reward any official act. *See* Pet. App. 5-8. Thus, where *Standefer* left the ultimate issue to the jury, the District Court below took the issue of whether the gifts were "for or because of any official act" away from the jury.

III.

THIS CASE DOES NOT CONCERN AN IMPORTANT FEDERAL QUESTION WARRANTING SUPREME COURT REVIEW.

As the Court of Appeals applied the actual language of the gratuity statute to conclude that it "means what it says," that decision poses no "serious obstacle to the federal prosecution of official corruption and the restoration of public confidence in governmental integrity." Pet. App. 12; Pet. at 22. Nor, as reflected above, does the decision conflict with any other federal court of appeals decision or otherwise subject federal officials in the District of Columbia to a different — and lower — unlawful gratuity standard than that imposed by Congress. Although these facts are sufficient to reject the Independent Counsel's petition, the issue presented here does not warrant Supreme Court attention for the following, additional reasons.

First, as indicated by the petition and this brief, very few cases in the past several decades have even tangentially addressed this issue.[21] In fact, most of the "gratuity" cases cited by the parties do not even construe the phrase "for or because of any official act performed or to be performed . . . ." And the decision below is the *only* case directly addressing the precise issue raised here, *i.e.*, whether a jury may acquit a defendant charged with violating the gratuity statute if the jury finds that the defendant gave a thing of value to a public official for or because of the official's position but not for or because of any official act performed or to be performed by the official.

Significantly, this case provides an inappropriate vehicle to render a decision with potentially broad consequences because the instant case involves unique facts and circumstances. In altering the statutory language, the District Court precluded Sun-Diamond from proffering a defense that the company's gifts to Espy were *not* "for or because of any official act," but rather were motivated by other, legitimate reasons. For instance, Larry Busboom, Sun-

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21. In comparison, Sun-Diamond is filing a cross-petition for certiorari, which concerns general, corporate imputation principles and so-called "honest services" fraud. *See* 18 U.S.C. §§ 1343, 1346. These issues arise virtually every day in courtrooms around the country.

Diamond's former President, testified at trial that the gifts to Espy by Sun-Diamond were (1) to foster Douglas's information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas's status in the agricultural and lobbying communities by being seen with a Cabinet Secretary.[22]

Moreover, this case, unlike most gratuity cases, involves an uncontested, *legitimate* friendship that spanned more than 25 years between the giver and the receiver of the purported unlawful gratuity. *See* Pet. App. 2; Brief for Appellant at 3-5 (filed September 15, 1997); *see also* Joint Appendix filed in Court of Appeals, Tab 3 at 963 (Independent Counsel conceding in closing argument that "nobody is saying that [Douglas and Espy's] friendship wasn't real"). These unique facts render this case distinguishable from virtually every other unlawful gratuity case in that the gift could well have been given for or because of Espy's position but *not* for or because of any official act.[23] Therefore, Supreme Court review of this jury instruction issue is premature because any future cases addressing this precise issue will likely follow the D.C. Circuit's well-reasoned decision, and any perceived conflict within the Courts of Appeals will likely resolve itself without intervention by this Court.[24]

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22. *Cf. Sawyer*, 85 F.3d at 731 n.15 ("We do not think that the desire to gain access, by itself, amounts to an intent to influence improperly the legislators' exercise of official duties. The government points to no legislative duty to provide equal access to all members of the public; and, from a practical standpoint, we doubt one exists."); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir.), *cert. denied*, 506 U.S. 919 (1992) ("granting or denying access to lobbyists based on levels of campaign contributions is not an 'official act' [sufficient to] form the basis for a charge of extortion or attempted extortion under the Hobbs Act").

23. Sun-Diamond does not dispute Judge Wald's statement that in most cases the distinction between "for or because of any official act" and "for or because of the official's position" is one without a difference. *See* Pet. App. 34. In this case, however, given the conceded long-term and close friendship between Douglas and Espy, the distinction is crucial to Sun-Diamond's defense. In any event, the clear statutory language dictates that this question is for the jury — not the judge — to decide.

24. Justice Harlan acknowledged that

> even where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict

(Cont'd)

Second, even assuming *arguendo* that the Court of Appeals adopted a gratuity standard more lenient than that established in another circuit, the Independent Counsel ignores the fact that specific statutes and regulations prohibit the type of conduct by federal employees the Independent Counsel asserts also is proscribed by the gratuity statute.[25] Moreover, public opinion, debarment and similar sanctions act to deter government officials and regulated parties from running afoul of ethics policies concerning government officials. In short, the Court of Appeals' decision will not eviscerate "governmental integrity" because multiple safeguards exist to ensure that members of the public, as well as public officials, do not violate basic conflict of interest rules, even if some of those rules do not rise to the level of criminal conduct.

Finally, to the extent that the Independent Counsel believes that the terms of the gratuity statute provide for a standard that is too lenient, this is an issue for Congress, not for this Court. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) (Souter, J., dissenting) ("If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.") (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)); *Watt v. Alaska*, 451 U.S. 259, 285 n.10 (1981) (Stewart, J., dissenting) ("It would be far more appropriate, given the constitutional allocation of lawmaking power to Congress and not to the courts, if this Court were to respect the plain meaning of the statute, and leave it to Congress to make any changes it thinks necessary."); *see also United States v. Generes*, 405 U.S. 93, 115

(Cont'd)

> may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. . . .

Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austr. L.J. 108, 112 (1959).

25. *See, e.g.*, 5 U.S.C. § 7353; 5 C.F.R. § 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); Rule XXXV of the Standing Rules of the Senate (amended July 18, 1995); Rule LII of the Rules of the House of Representatives (amended October 16, 1995); *see also* 9 C.F.R. § 203.2 (Department of Agriculture regulation concerning gifts from packers of meat to government employees).

(1972) (Douglas, J., dissenting) ("Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.") (citation omitted).

IV.

THE COURT OF APPEALS CORRECTLY INTERPRETED THE GRATUITY STATUTE BY ADHERING TO ITS EXPRESS LANGUAGE.

"If the statute is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.' " *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citations omitted). Despite the Independent Counsel's arguments, the Court of Appeals applied the gratuity statute as it is written to hold correctly that the District Court's jury instructions were erroneous and improperly precluded Sun-Diamond from presenting certain defenses to the jury. Although the Independent Counsel argues that the term "official act" means "official position," this assertion is belied by Congress's decision to define "official act" as

> any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3) (emphasis added). By defining "official act" as some "decision or action," Congress made clear that it did not deem "official position" a synonym for "official act." Indeed, this Court in *United States v. Brewster*, 408 U.S. 501 (1972), recognized that

> [t]o sustain a conviction [under a predecessor gratuity statute,] it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation *for an official act*.

Id. at 527 (emphasis added); *see also id.* at 553 (White, J., dissenting) (the predecessor gratuity statute "requires proof of a defendant's receipt, or an agreement or attempt to receive, anything of value 'for or because of any official act performed or to be performed by

him. . . . ' . . . *[W]hatever the act, the Government must identify it to prove its case.*") (emphasis added).

Applying the statute's plain meaning, the Court of Appeals correctly held that:

> To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts.
>
> * * *
>
> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands — evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. *But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.*

Pet. App. 7, 12-13 (emphasis added).[26]

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26. It is "unnecessary" to track the statutes' legislative history "in light of the plain meaning of the statutory text." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Nonetheless, the legislative history supports the Court of Appeals' holding and demonstrates that Congress did not intend to criminalize conduct "for or because of the official's position." As with most legislation, the gratuity and conflict of interest (18 U.S.C. § 203) statutes were subject to legislative compromise. Senator Keating offered an amendment to address a void in the proposed laws related to "gifts to Federal employees." *See* S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3867 (individual views of Senator Keating). The amendment would have:

> prohibit[ed] any Government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person (a) is seeking to obtain

(Cont'd)

Other circuit court decisions have adopted the reasoning reflected in the decision below. In addition to the cases miscited by the Independent Counsel, the First Circuit in *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), construed a virtually identical state gratuity statute[27] to hold that "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.' " *Id.* at 735 (emphasis in original). The First Circuit required a nexus between the gift and an "official act" throughout its opinion to give effect to the statutory language. *See id.* at 736 ("statute proscribes gratuities motivated by 'official acts' rather than 'official position' "); *id.* at 730 ("As the word 'gratuity' implies, the intent most often associated with the offense is the intent to 'reward' an official for an act taken in the past or to be

(Cont'd)

> contractual or other business or financial relationships with the employee's agency or (b) conducts operations or activities which are regulated by the employee's agency, or (c) has interests which may be substantially affected by the employee's performance or nonperformance of his official duties.

Id. But Congress chose *not* to adopt this amendment. *See also* July 10, 1960 Letter from R. Kramer to E. Celler, *reprinted in* Hearings on H.R. 2156 Before the Antitrust Subcommittee of the Committee of the Judiciary, 86th Cong., 2d Sess., 613 (1960) ("for or because of *such act*") (emphasis added); Staff of Subcommittee No. 5 of the House Committee of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcommittee No. 5 of the Committee of the Judiciary, House of Representatives, Parts I & II, 62, 71-72 (Comm. Print Mar. 1, 1958) (referring to criminalizing of gifts given "as a reward for an official act").

27. The Massachusetts gratuity statute at issue in *Sawyer* stated in pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of substantial value to any present or former state . . . employee . . . *for or because of any official act performed or to be performed by such an employee* . . . [commits a felony].

Mass. Gen. Laws. ch. 268A, § 3(a), (d) (emphasis added); *see also id.* § 1(h) (defining "official act" as "any decision or action in a particular matter or in the enactment of legislation").

taken in the future"); *id.* at 736 ("the use of the term 'official act' appears to ensure that the gratuity would be deemed unlawful only when the giving of an item of 'substantial value' is linked to the official's performance of duties"). Similarly, the Eighth Circuit in *United States v. Patel*, 32 F.3d 340 (8th Cir. 1994), approved a gratuity jury instruction requiring the government to "prove, beyond a reasonable doubt, that the defendant intended to reward [the government official] for past action or action [the official] was already committed to take." *Id.* at 345 (quoting jury instructions). Nor are these decisions anomalous.[28]

Perhaps the Independent Counsel's interpretation of the gratuity statute stems from a misunderstanding of the distinction between a bribe and an unlawful gratuity. *See* Pet. at 23-24 (asserting that the Court of Appeals' interpretation of an unlawful gratuity is "virtually indistinguishable from a bribe"). An unlawful gratuity is a lesser included offense of a bribery violation, which requires "a more exacting showing of intent"; the bribery — but not the gratuity — statute requires a specific, corrupt intent to elicit a *quid pro quo*. Pet. App. 7; *see also* § 201(b)(1)(A). Thus, where the gratuity statute "carries the concept of the official act being done anyway," the bribery law requires a gift of a thing of value to a public official with a specific intent *to influence* certain action or inaction that the official may not have otherwise performed. *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) (emphasis added); *see*

28. *See, e.g., United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (emphasis added) (the gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as *a reward for actions the public official has already taken or is already committed to take*"); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (finding in the case of an unelected official that "[t]he proof need not show that the payor intended to exact action by the recipient, although it must show that the payor gave the gratuity because of the act"; "an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment"); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (holding that the gratuity statute has two components: (1) that the alleged gifts be made for or because of an official act; and (2) that the defendant receive the gift "with a certain guilty knowledge, . . . *i.e.*, with 'knowledge that the donor was paying him compensation for an official act.' ") (citations omitted); *see also* cases cited by the Independent Counsel, discussed *infra*.

also United States v. Nardello, 393 U.S. 286, 293 n.11 (1969) ("Bribery has traditionally focused upon corrupt activities by public officials."); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("[p]ayments to a public official for *acts* that would have been performed in any event . . . are probably illegal gratuities rather than bribes") (emphasis added) (quoting *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982)).[29]

The Court of Appeals grasped this distinction when explaining that although a *quid pro quo* need not be shown to prove a violation of the gratuity statute, the "official act" language is not superfluous:

> [T]o say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. *But the gratuity statute by its terms does still require at least a unidirectional relationship — the gift must be "for or because of" the act.*

Pet. App. 8 (emphasis added).

The Court of Appeals thus rejected the District Court's instructions which rendered Sun-Diamond's intent irrelevant and relieved the Independent Counsel of his burden of proving every element of the gratuity offense beyond a reasonable doubt. In fact, the District Court effectively established an irrebuttable presumption that Sun-Diamond gave gifts to Espy "for or because of an[ ] official act" merely because the company provided Espy with things of value while he was in a position to take official action affecting Sun-Diamond. In so doing, the District Court deprived Sun-Diamond of its constitutional right to present this issue to the jury. And this is why the Court of Appeals reversed Sun-Diamond's gratuity conviction.

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29. *See also Brewster*, 506 F.2d at 82 (defining "corrupt" as "incorporating a concept of the bribe being the prime mover or producer of the official act"); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (same proposition).

CONCLUSION

For the reasons given above, it is respectfully submitted that the Court's discretionary jurisdiction should not be invoked and the Independent Counsel's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED MARCH 20, 1998

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**

96cr00193-01

United States of America, Appellee

v.

Sun-Diamond Growers of California, Appellant

Before: WILLIAMS, HENDERSON AND TATEL, *Circuit Judges.*

ORDER

It is ORDERED by the Court that the opinion of March 20, 1998 be amended as follows:

Page 11, line 9, before "*Umans*," insert a footnote 5 as follows and renumber the rest of the footnotes.

5. The independent counsel's briefs made no mention of *Standefer*, but in a petition for rehearing he notes that the Supreme Court, in affirming the judgment on other grounds, *Standefer v. United States*, 447 U.S. 10 (1980), said in a footnote that "the instructions to the jury on criminal intent" were "correct." *Id.* at 14 n. 8. Standefer's briefs in the

Appendix A

Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir. 1979), however, make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8. In any event, the instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk

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(3)

No. 98 - 131

IN THE

Supreme Court of the United States

October Term 1997

United States of America,

Petitioner,

v.

Sun-Diamond Growers of California,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY OF THE UNITED STATES

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13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. There Is A Split In The Circuits On The Scope Of The Unlawful Gratuity Statute, 18 U.S.C. § 201(c)(1)(A) 1

II. The Scope Of The Unlawful Gratuity Statute Is Important And Recurring Issue 4

III. The District of Columbia Circuit's Decision Is Wrong 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: **Page**

Standefer v. United States, 447 U.S. 10 (1980)..... 3
United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976)..... 2, 3
United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995)..... 2, 3
United States v. Evans, 572 F.2d 455 (5th Cir. 1978)..... 1, 3
United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986)..... 3
United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991)..... 2
United States v. Sawyer, 85 F.3d 723 (1st Cir. 1996)..... 2
United States v. Secord, 726 F. Supp. 845 (D.D.C. 1989)..... 1
United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).... 1, 2, 3
United States v. Umans, 368 F.2d 725 (2d Cir. 1966)..... 2, 3

Statutes:

18 U.S.C. § 201(a)(3)..... 6
18 U.S.C. § 201(c)(1)(A)..... 1, 5, 6

Other Sources:

H.R. Rep. No. 748, 87th Cong., 1st Sess. (July 20, 1961)..... 7

REASONS FOR GRANTING THE WRIT

I. There Is A Split In The Circuits On The Scope Of The Unlawful Gratuity Statute, 18 U.S.C. § 201(c)(1)(A)

1. Despite the industrious efforts of Sun-Diamond's counsel to argue away the significant circuit split regarding the scope of the unlawful gratuity statute, Respondent's Brief In Opposition ("Opp.") 5-14, the judges of the D.C. Circuit recognized the division of authority. Judge Wald, in concurring in the denial of the United States' suggestion for rehearing *en banc*, declared that

> I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. *The current circuit split calls for Supreme Court attention.*

App. 34 (internal citations omitted) (emphasis added).

2. Likewise, Sun-Diamond's suggestion in a footnote that the D.C. Circuit panel that decided this case did not acknowledge the split but, instead, only stated that the United States alleged such a split, *see* Opp. 6 n.6, is a mischaracterization of the D.C. Circuit opinion. What the panel in fact stated was the following:

> The independent counsel points to *United States v. Secord*, 726 F. Supp. 845, 847 (D.D.C. 1989), as well as several decisions by other courts of appeals apparently holding that gifts motivated solely by the recipient's official position may be illegal gratuities. See *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir.1979) (*en*

banc); [*United States v.*] *Umans*, 368 F.2d at 730 [(2d Cir. 1966)]; *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir.1995); *cf. United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.1976) (suggesting that donee's ability to use his position for donor's benefit was enough to satisfy the official act requirement). These decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says, "Generally, no proof of a *quid pro quo* is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*. Other out-of-circuit cases seem to take the official act requirement more seriously. *See*, e.g., *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) ("an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment") (citing *Brewster*); cf. [*United States v.*] *Sawyer*, 85 F.3d at 735-36 [(1st Cir. 1996)] (construing virtually identical Massachusetts gratuity statute.

App. 11-12 (footnote omitted).

3. Unlike several other Circuits, the D.C. Circuit has rejected an interpretation of the statute that would prohibit regulated entities from giving gratuities to gain the generalized goodwill of federal officials. See App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities" unless the government proved they were intended to influence Espy's performance of official acts in the future). Contrary to Sun-Diamond's protestations, there is no dispute that the D.C. Circuit's interpretation of the statute

distances it from other Circuits. *See, e.g., United States v. Umans*, 368 F.2d 725, 728 (2d Cir. 1966) (the unlawful gratuity statute "only requires proof that payment was made to an agent in a situation where no payment was necessary"); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979)(*en banc*) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes"), *aff'd*, *Standefer v. United States*, 447 U.S. 10 (1980);[1] *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978) ("under the unlawful gratuity subsection all that need be proven is that the official accepted, *because of his position*, a thing of value 'otherwise than as provided by law for the proper discharge of official duty'") (emphasis added); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995) ("it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office"); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986) (the purpose of the statute "is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position"); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976) (the "jury could properly conclude from the testimony at trial that [the defendant] knew [the camp administrator] was in a position to use his authority in a manner which would affect the conditions of confinement of [the defendant's] father").

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[1] The United States acknowledges that the precise extent to which this Court ruled on the intent necessary to commit the offense of providing unlawful gratuities to a federal official is unclear from the briefs on the merits and the Court's single footnote in *Standefer v. United States*, 447 U.S. 10, 14 n.8. With all due respect, however, when this Court states that a petitioner has challenged "the instructions to the jury on criminal intent," *id.*, and then declares that "[w]e agree with the Court of Appeals that the instructions were correct," *id.*, such a statement is not "*dictum*," as Sun-Diamond argues. *See* Opp. 17.

II. The Scope Of The Unlawful Gratuity Statute Is An Important And Recurring Issue

1. The D.C. Circuit's decision in this case has potentially severe and detrimental effects on efforts to prosecute corruption of federal officials making decisions in the nation's capital. The D.C. Circuit's interpretation of the statute will make it difficult, at best, to prosecute persons or entities for bestowing largesse on federal officials in the District of Columbia before an official takes a particular action, unless the government essentially has proof of a bribe.[2] Bribery, however, is a separate and considerably more serious offense than giving unlawful gratuities under federal law, with far stiffer penalties. The D.C. Circuit's decision in this case comes perilously close to eliminating the unlawful gratuities offense as a lesser included offense of bribery when the payment or gift is made prior to any official action. *See* Brief For Public Citizen As *Amicus Curiae* In Support Of Petitioner 5-7.

2. In the United States' petition for a writ of *certiorari* and Sun-Diamond's opposition brief, the parties cite and discuss no fewer than eighteen published decisions addressing the unlawful gratuity statute, including one case that reached this Court on the merits. This number of published appellate decisions alone suggests that the gratuity statute is important, even if its meaning is not being litigated "virtually every day in courtrooms around the country." Opp. 21 n.21. In fact, it would be disheartening were the gratuity statute being litigated on such a wide scale, since such a situation would suggest an astronomical level of federal governmental corruption. This

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[2] Sun-Diamond appears to be arguing that unlawful gratuities prosecutions are unnecessary, or perhaps that there should be no unlawful gratuity offense, because government ethics regulations prohibit similar conduct and various civil and political sanctions may be applied to officials who take gratuities. Opp. 23. Sun-Diamond does not deny, however, and cannot, that if the unlawful gratuity statute is severely limited in its scope, there often may be no *criminal* prohibition that applies to official corruption short of bribery.

Court has never indicated that its standard for granting *certiorari* is that issues do not merit the Court's plenary review unless they are the subject of litigation on a daily basis.

Moreover, the conduct that could give rise to an unlawful gratuities prosecution — the giving of gifts and things of value to federal officials — may occur on a daily basis, especially in the District of Columbia.[3] Certainly, in light of the D.C. Circuit's decision in this case, it is likely to occur more frequently.

III. The District of Columbia Circuit's Decision Is Wrong

1. Sun-Diamond devotes considerable effort to convincing the Court that the D.C. Circuit correctly interpreted the unlawful gratuity statute. Opp. 24-28. Although that proposition, even if true, would not alone counsel against this Court's review given the clear circuit split, the United States will briefly address the merits of the D.C. Circuit's decision. Sun-Diamond supports the D.C. Circuit's interpretation of the statute by relying almost exclusively on the "for or because of any official act performed or to be performed" language of § 201(c)(1)(A), as did the D.C. Circuit. Although this is a logical and appropriate starting point for the analysis, it is not the ending point for at least two reasons.

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[3] Sun-Diamond, for example, argues that it lavished gifts and gratuities upon Espy for "legitimate reasons," Opp. 21, including "(1) to foster Douglas's information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas's status in the agricultural and lobbying communities by being seen with a Cabinet Secretary." *Id.* at 22. But surely not everyone, perhaps not even most, would agree that the foregoing are "legitimate reasons" for providing gratuities worth thousands of dollars to a Cabinet Secretary. Moreover, it is no defense in this case, in which Sun-Diamond — the corporate entity — *is the defendant*, to argue that Douglas gave Espy gifts because the two men were longtime friends. *See id.* Douglas and Espy apparently were friends, but *Sun-Diamond paid* for the gratuities, not Douglas.

2. Very importantly, the phrase "official act" is defined in the statute. This definition, to which neither the D.C. Circuit nor Sun-Diamond gives any attention in their analyses of the statute, is very broad. Specifically, "official act" is defined as

> any decision or action on *any* question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

The statutory definition suggests that § 201(c)(1)(A) reaches gifts to federal officials motivated by matters that may not yet be pending before those officials (matters "which may at any time be pending"), or perhaps even which may never actually be pending (matters "which may by law be brought before any public official"). Moreover, the definition of "official act" focuses in part on the official's *position* (matters before the official in "such official's official capacity, or in such official's place of trust or profit"), a proposition the D.C. Circuit flatly rejected in this case. The broad definition of "official act," coupled with the statute's express application to "any" such acts "to be performed," counters the D.C. Circuit's and Sun-Diamond's position that the statute's language requires proof of specific official acts that the official has or will in the future perform in exchange for the gratuity.

Incorporating the definition of "official act" into § 201(c)(1)(A), it is both consistent with the statutory language and sensible to conclude that the unlawful gratuity statute reaches efforts to buy favor or generalized goodwill from an official who either has been, is, or may be at some unknown, unspecified later time, in a position to act favorably to the giver's interests. Literally, the statutory provisions operate together to provide that an unlawful gratuity offense

has been committed when a person gives a thing of value to a federal public official

> for or because of any [decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit] performed or to be performed by such public official . . . .

As Judge Wald recognized, a straightforward reading of the statutes appears to cover the provision of gratuities to a Cabinet Secretary by a regulated entity that in the past has had, currently has, or in the future likely will have matters pending before the Secretary. App. 34 ("I admit that the main distinction the panel draws between gifts motivated by an official's 'position' and gifts motivated by an official's 'acts' eludes me altogether.").

3. The structure of the statute and the formal legislative history strongly suggest that Congress created two separate offenses in this context — bribery and unlawful gratuities — that have different elements and different punishments. As previously discussed, although § 201 is labeled a "Bribery" statute, Congress, the courts and commentators long have recognized that it creates two different offenses. *See* United States' Petition For A Writ Of Certiorari 21-22. Moreover, the House Report that accompanied the original § 201 provisions in 1961 clearly indicates that Congress contemplated the offense of giving or receiving an unlawful gratuity to be an important but lesser offense than bribery. In describing the unlawful gratuity offense, the Report declares that "[t]he conduct which is forbidden has the appearance of evil and the capacity of serving as a cover for evil." H.R. Rep. No. 748, at 19 (July 20, 1961) (emphasis added).

The D.C. Circuit's decision, however, makes it difficult, at best, to obtain an unlawful gratuity conviction when a

gratuity is given in anticipation of future official action, unless the Government essentially proves bribery. The statute's language, structure and history do not require that result, and most other circuits have not so limited the statute's application.

CONCLUSION

The D.C. Circuit's decision in this case creates a significant circuit split on the scope of an important federal criminal statute. The unfortunate result of the D.C. Circuit's decision is that the federal law applied in the District of Columbia is the most tolerant of gratuities given to federal officials, such as Cabinet Secretaries. Unlawful gratuities prosecutions have occurred multiple times during the years. As the *amicus* brief in support of the United States demonstrates, the unlawful gratuity statute matters to anyone who is concerned about government integrity, as everyone should be. Moreover, the brief in opposition demonstrates that Sun-Diamond's counsel will provide a spirited defense of the D.C. Circuit's decision.

For the foregoing reasons and the reasons set forth at length in the petition for a writ of *certiorari*, the United States respectfully requests that the Court grant plenary review to resolve the circuit conflict and establish the proper interpretation of 18 U.S.C. § 201(c)(1)(A).

Respectfully submitted,

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No. 98-131

In The
Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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14 pp

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2, Public Citizen respectfully moves the Court for leave to file the attached brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.

1. Public Citizen is a national consumer organization with 120,000 members. Since its founding in 1971, Public Citizen has urged the enactment and enforcement of high ethical standards covering federal officials and those individuals or groups that lobby to obtain economic benefits from the federal government. Public Citizen believes that such policies are needed to promote confidence in government and to prevent corruption or the appearance of corruption.

2. Public Citizen seeks leave to file this brief because of its concern that the decision below misconstrued the federal gratuity statute by blurring the line between bribes and illegal gratuities in a way that could make criminal sanctions unavailable when, as here, a Washington, D.C. lobbyist lavishes gifts on a federal official charged with making decisions worth millions of dollars to a lobbyist's client or employer.

3. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has declined to consent.

Wherefore, for the foregoing reasons, Public Citizen respectfully asks that this motion be granted.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* 1
TABLE OF CONTENTS i
TABLE OF AUTHORITIES i
BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER 1
INTEREST OF *AMICUS CURIAE* 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5
CONCLUSION 11

TABLE OF AUTHORITIES

Cases:
United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976) ... 5
United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) .. 4
United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) . 5
United States v. Evans, 572 F.2d 455 (5th Cir. 1978) 5
United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) .. 5
United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (*en banc*), *aff'd*, 447 U.S. 10 (1980) 5
United States v. Umans, 368 F.2d 725 (2d Cir. 1966) 5

Statutes:
18 U.S.C. § 201(a)(3) 3
18 U.S.C. § 201(c)(1)(A) ..... *passim*
18 U.S.C. § 201(c)(1)(B) 8-9

Regulations:
5 C.F.R. § 2635.102(a) 8
5 U.S.C. § 2635.102(h) 8
5 C.F.R. § 2635.204(a) 9
5 C.F.R. § 2635.204(b) 9-10

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Public Citizen is a non-profit consumer organization with over 120,000 members nationwide. Since its founding in 1971, Public Citizen has urged the enactment and enforcement of high ethical standards governing federal officials and those individuals or groups that lobby to obtain economic benefits from the federal government. Public Citizen and its members believe that such policies are needed to promote confidence in government and to prevent corruption or the appearance of corruption. They are concerned that the District of Columbia Circuit in this case has blurred the line between bribes and unlawful gratuities and has required a higher level of proof in unlawful gratuity cases than has any other appellate court. If the decision below is allowed to stand, the result will be that gift-giving to federal officials will be judged by a more permissive standard in the nation's capital than in it would be in other jurisdictions.

STATEMENT

In the decision below, the District of Columbia Circuit reversed a criminal conviction of respondent Sun-Diamond Growers of California, a large farm cooperative made up of individual member cooperatives. Sun-Diamond had been found guilty after a jury trial of giving $5900 in unlawful gratuities to Mike Espy, the Secretary of Agriculture. These gratuities consisted of tennis tickets, luggage, meals, and a framed print and crystal bowl, which were given to Espy by Richard Douglas, Sun-Diamond's vice-president for corporate affairs, who had known Espy since college. Pet. App. 2, 4.

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[1] Pursuant to Rule 37.6, Public Citizen states that its counsel wrote this entire brief and that no outside entity made a monetary contribution toward the preparation or submission of this brief.

The gratuities were given to the Secretary at a time when the Department of Agriculture ("USDA") was considering several issues affecting Sun-Diamond. Two in particular had potentially major economic consequences for Sun-Diamond and its members. First, USDA operated the "Market Promotion Program," a subsidy program designed to promote U.S. farm exports. According to the Independent Counsel, this program generated $23.9 million in federal grants to Sun-Diamond members from 1990 to 1995. Pet. App. 3. In 1993, Congress required USDA to steer more of the money in this program to "small-sized entities." Pet. App. 3. How the Secretary defined "small-sized entities" was important to Sun-Diamond, which wanted the definition written so that individual growers who belonged to Sun-Diamond's member cooperatives might be directly eligible for such grants. Pet. App. 3. This was an issue that Sun-Diamond's vice-president, Richard Douglas, discussed directly with Secretary Espy. See Brief for Appellee at 9, D.C. Cir. No. 97-3072.

The second major issue of concern was a proposed ban of methyl bromide, an ozone-depleting chemical that some of Sun-Diamond's members used to treat their crops. Although the ban was being considered by the Environmental Protection Agency, the evidence indicated that Sun-Diamond wanted USDA weigh in against such a ban, or at least urge a delay in its implementation. Pet. App. 4. This too was an issue that Sun-Diamond's vice-president raised directly with the Secretary, and it was a critical matter for Sun-Diamond members because there was no ready substitute for methyl bromide. Brief for Appellee at 9-10, D.C. Cir. No. 97-3072.

In the first count of the indictment, the Independent Counsel charged that Sun-Diamond's gifts to Secretary Espy violated the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A),

which states in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

The statute goes on to define "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

In reversing the conviction, the Court of Appeals believed that the "key dispute here is over how close a link the government must show between Sun-Diamond's gifts and official acts that the Secretary of Agriculture performed or might perform." Pet. App. 3. The court concluded that the phrase "for or because of any official act," which describes the level of intent needed for a violation of the unlawful gratuity statute, requires an intent "either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts." Pet. App. 7. Thus, if Mr. Douglas gave the Secretary gifts "merely to win his generalized sympathy for Sun-Diamond," those gifts would not be illegal gratuities unless "the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." Pet. App. 10.

The Court of Appeals acknowledged that the illegal

gratuity statute operates side by side with federal bribery laws, and that "an unpromised benefit for a past governmental favor" would constitute an illegal gratuity, if not a bribe. Pet. App. 8. When gifts are made with an eye towards future acts, however, the government must show that the payment was being made "'because of a specifically identified act.'" *Id., quoting United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974)(emphasis in panel decision omitted).

As the Court of Appeals read the jury instructions, however, the trial judge permitted the jury to convict if it found that Secretary Espy had received things of value merely because of his official position. The Court of Appeals acknowledged that its reading of the gratuity statute was narrower than the reading adopted in other circuits, Pet. App. 11, but concluded nonetheless that the conviction could not stand and that a new trial was required.

The Independent Counsel sought rehearing, which was denied. Pet. App. 32. Judge Wald, although concurring with that decision, nonetheless deemed the decision worthy of review by this Court, noting that the panel's distinction between "bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's 'position,' rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the 'snicker test' with laymen." Pet. App. 34.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision below creates an irreconcilable conflict between the circuits on an important question of federal law. As the Independent Counsel argues, and as the Court of Appeals appeared to acknowledge,

the latter's interpretation of the federal gratuity law is at odds with the results reached in several other circuits. *Compare United States v. Umans*, 368 F.2d 725 (2d Cir. 1966); *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979)(*en banc*), *aff'd*, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978); *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995); *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976). *See also United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986).

We note too the incongruity that this decision creates. This ruling, if allowed to stand, will set the standard for criminal prosecutions in the District of Columbia, where many lobbyists earn a living trying to influence government decision-makers on national policy matters. The decision thus sets up a dichotomy under which conduct that may warrant criminal sanctions elsewhere would be subject to a more lenient standard "inside the Beltway." Indeed, gratuities paid to low-level officials at a regional office would be punished more severely than gratuities paid to their superiors sitting in Washington, a paradoxical outcome that underscores the importance of this case and the need for granting review.

We do not intend to repeat the legal arguments made by the Independent Counsel, which are cogent and persuasive. We wish instead to focus on the implications of the decision below for the enforcement of ethical standards in government. We suggest that those considerations indicate the significance of the decision below and the need for review by this Court.

The decision below blurs the distinction between bribes and illegal gratuities when a gift is bestowed before a government official takes a particular action. The District of Columbia Circuit acknowledged that in order to make out a case of

bribery, an explicit *quid pro quo* is necessary. Pet. App. 7-8. To prove an unlawful gratuity, however, the Court of Appeals held that a prosecutor must be able to identify a "specifically identified act" that the donor wished the government official to take, Pet. App. 8, and no criminal violation can be found if gifts are given with a "vague hope of inducing warm feelings toward the donor" or "merely to win [an official's] generalized sympathy." Pet. App. 9, 10.

This analysis comes perilously close to eviscerating the unlawful gratuity statute. Many trade associations, corporations and other groups that maintain a lobbying presence in Washington, D.C. are not single-issue organizations, but have a number of items on their agenda, often before the same agency. Thus, at any one time, and as the facts here illustrate, there are usually several favorable actions -- or "official acts" -- that these entities would like a particular agency to take on matters of concern to them.

How then does a prosecutor prove which "specifically identified act" was the impetus for a gift or gifts to a government official? Take this case, for example. Most lobbyists know that they are unlikely to win on every issue. Also, the regulatory process is such that one may be able to obtain some relief on a given issue, though not necessarily all that one would prefer. Thus, in all likelihood, Sun-Diamond would have likely declared victory had it managed to persuade the Secretary on either the subsidy issue or the methyl bromide issue. In addition, Sun-Diamond would likely have declared victory by obtaining only limited relief on both issues, for example, if USDA decided to define "small-sized entities" in a way that helped some of its members, if not all of them, or if any ban on methyl chloride was phased in over a six-month period, rather than a three-month period or immediately.

What, then, is the "specifically identified act" that the U.S. Open tickets, the thousands of dollars worth of luggage, the restaurant bills and the other items were intended to influence? Sun-Diamond, of course, sees no connection, but its argument demonstrates the gaping loophole that would be created if the decision below is allowed to stand.

The company asked the following rhetorical question in its brief to the Court of Appeals:

> Are Douglas' dinners and sporting events transformed into felonious acts merely because he elected to seek reimbursement from his employer, recognizing, as he must, that his very friendship with Espy is at once personal yet accords him an opportunity to better understand and learn about the Department of Agriculture? Is Sun-Diamond really on notice that approving these expense reimbursements is unlawful even though the underlying expenditures had no relation to any official act, as required by statute?

Brief for Appellant at 25, D.C. Cir. No. 97-3072. With due respect, it is difficult to see how the size and nature of Mr. Douglas's gift-giving qualifies as such a modest and lawful effort to let him "better understand and learn about the Department of Agriculture," but that would seem to be a plausible defense under the decision at issue here.

And Sun-Diamond's gifts were truly extravagant under federal ethics standards. Trading on a friendship going back to their college years, Mr. Douglas gave the Secretary the following items, which Sun-Diamond wrote off as legitimate business expenses:

- a weekend in New York, including tickets to the 1993

U.S. Open tennis tournament, worth $2295;
- luggage worth $2427;
- meals worth $665; and
- a framed print and crystal bowl worth $524.

Pet. App. 4.[2]

Compare this largesse with what is allowed under regulations issued by the Office of Government Ethics ("OGE"), which cover executive branch agencies and officials, 5 C.F.R. § 2635.102(a), (h). These rules offer detailed guidance to officials and lobbyists interested in what is and is not acceptable here. The regulations clearly state that, with certain exceptions, "a gift accepted under the standards in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)," which bars the receipt of unlawful gratuities and is thus the flip-side of the statute at issue here.

OGE rules state that government officials may not accept gifts of more than $20 at any one time or that aggregate $50 in a single year. 5 C.F.R. § 2635.204(a). Indeed, OGE provides specific examples that illustrate how strict these guidelines are. Thus, if a government official gives a speech to a trade group and is given a book and a map, one of which is worth $18 and the other $15, the official can accept one, but not both, since the

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[2] The $2295 that Sun-Diamond spent on Secretary Espy for this weekend in New York did not include an additional $6890 that was spent on the Secretary's girlfriend, Mr. Douglas and his girlfriend, all of whom accompanied the Secretary on this trip.

Apart from the gifts set forth in the text, Douglas also provided $3100 so that the Secretary's girlfriend could accompany him to an international conference in Greece in 1993. The Independent Counsel charged in a separate count that this was an unlawful gratuity, but the jury acquitted on this count.

"one-time" value is greater than $20, even though the aggregate is under $50. *Id.*, Example 2. Similarly, if someone such as Mr. Douglas wanted to invite the Secretary and his girlfriend to attend a play that cost $30 per ticket, the Secretary could not accept the tickets and could "attend the play only if he pays the full $60 value of the two tickets." *Id.*, Example 1.

OGE regulations also address Sun-Diamond's defense at trial, namely, that there was a personal relationship between the Secretary and Mr. Douglas that stretched back to their college days. OGE makes it clear that gifts based on personal friendships are not forbidden, within certain limits:

> An employee may accept a gift given under circumstances which *make it clear* that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend *personally pays for the gift*.

5 C.F.R. § 2635.204(b)(emphasis added).

Again, OGE offers examples that show how far out of line Sun-Diamond's gratuities were in this case. Specifically, OGE advises that three partners at a law firm that practices before the Federal Trade Commission could not invite an FTC lawyer, at the firm's expense, to join them in a golf tournament that charged $500 per foursome, even though the FTC lawyer "and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC." *Id.*, Example 2. OGE explains that the fact that "the fees are to be paid by the firm" indicates that this is "not a personal friendship but a business relationship that is the motivation behind the partners'

gift." *Id.*

By contrast, if an employee at the FDIC is dating a secretary at a regulated bank, and if the bank has given each secretary two tickets to a play and encouraged them to bring a family member or friend to the show, the FDIC employee may accept the free ticket, which OGE views as "given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship." *Id.*, Example 1.[3]

These rules cover other situations in considerable detail, but these examples should suffice to make our point that the conduct at issue here stepped way over the line. Thus, we are not dealing with some hyper-technical violation of federal law that is being pursued by an over-zealous prosecutor. Instead, the case involves a lobbyist's effort to lavish gifts on a high-ranking government official who is in a position to take or affect

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[3] These examples answer the Court of Appeals' apparent concern that the Independent Counsel's theory of liability was unduly expansive and could trigger liability under the unlawful gratuity law if a newly appointed judge were invited to a baseball game by an old friend whose employer had a case pending in that court. Pet. App. 10-11 n.4. If the ticket cost $20 or less, there would be no problem. If the friend paid for the ticket or if they went to baseball games together each year, the safe harbor in section 2635.204(b) likely applies, as it would seem "clear that the gift is motivated by a . . . personal friendship" rather than the judge's position.

Of course, that scenario is light years away from the situation here, which is comparable to the long-time friend's employer buying tickets to an out-of-town World Series game for the judge, the friend and their spouses, giving the judge expensive luggage, and buying meals along the way.

official actions worth millions of dollars to Sun-Diamond's members. Whether this conduct is enough to constitute a violation of the federal gratuity statute or whether a more precise connection to a specific "official act" must be proven is an important question that warrants plenary review.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98 - 131

IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED NOVEMBER 2, 1998

32 pp

TABLE OF CONTENTS

Relevant Docket Entries From the District Court ..... J.A. 1

Relevant Docket Entries From the Circuit Court ..... J.A. 4

Indictment ..... J.A. 7

CROSS REFERENCE TO OTHER RELEVANT DOCUMENTS

Pursuant to Supreme Court Rule 26, the Joint Appendix does not reproduce the following relevant documents already before the Court:

From the Appendix to the Petition for Writ of Certiorari ("Pet. App."):

United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998) ..... Pet. App 1

Order denying the United States' petition for rehearing and rehearing en banc ..... Pet. App. 32

United States v. Sun-Diamond Growers of California, 941 F.Supp. 1262 (D.D.C. 1996) ..... Pet. App. 35

Relevant Jury Instructions ..... Pet. App. 67

From the Appendix to the Respondent's Brief in Opposition ("Opp. App."):

Order of the United States Court of Appeals for the District of Columbia Circuit Dated March 20, 1998 ..... Opp. App. 1a

Relevant Docket Entries From District Court

6/13/96 INDICTMENT filed against SUN-DIAMOND GROWERS OF CALIFORNIA (1) count(s) 1-2, 3-4, 5, 6-9 (mln) [Entry date 06/14/96]

6/27/96 ARRAIGNMENT held before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS (1) count(s) 1-2, 3-4, 5, 6-9: Plea of not guilty entered by attorney Richard Hibey on behalf of defendant SUN-DIAMOND GROWERS (1) as to count(s) 1-2, 3-4, 5, 6-9; Status hearing set for 10:00 AM on 8/5/96; Trial (2.5 weeks) set for 10:00 AM on 9/9/96 for SUN-DIAMOND GROWERS Reporter: William McAllister (kk) [Entry date 07/03/96]

7/23/96 MOTION filed by defendant SUN-DIAMOND GROWERS to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9; Exhibits (5) (kk) [Entry date 07/25/96]

8/5/96 RESPONSE by plaintiff USA in opposition to motion by defendant SUN-DIAMOND GROWERS to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1]; Exhibits (2) (kk) [Entry date 08/06/96]

8/12/96 REPLY MEMORANDUM by defendant SUN-DIAMOND GROWERS in support of its motion to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1] (kk) [Entry date 08/15/96]

9/5/96 MOTIONS HEARING before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS: Motion by defendant SUN-DIAMOND GROWERS (1) in limine to preclude the Independent Counsel from using certain summary charts at trial, granted; Motion by USA to allow leading questioning of SUN-DIAMOND witnesses in the Government's case-in-chief [35-1], denied; Motion by USA to exclude SUN-Diamond's reliance on advice by counsel defense [37-1], or in the alternative, to

require SUN-DIAMOND to produce all documents relating to such defense [37-2], denied; Motion by USA to compel production of reciprocal discovery materials [39-1], or in the alternative, to preclude any reference to such materials at trial [39-2]; granted; Motion by USA to admit summary charts at trial [40-1] and to permit the use of those charts during the opening statement [40-2], taken under advisement; Motion by defendant SUN-DIAMOND GROWERS (1) to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1], denied. Reporter: William D. McAllister (kk) [Entry date 09/11/96]

9/9/96 USA's PROPOSED JURY INSTRUCTIONS TO WHICH DEFENDANT SUN-DIAMOND GROWERS HAS NOT AGREED, FOLLOWED BY DEFENDANT'S OBJECTIONS (kk) [Entry date 09/16/96] [Edit date 09/16/96]

9/9/96 NOTICE OF FILING by USA of Defendant's proposed jury instructions to which the Government has not agreed, followed by the Government's objections (kk) [Entry date 09/16/96]

9/9/96 NOTICE OF FILING by USA as to SUN-DIAMOND GROWERS of Proposed Jury Instructions upon which the parties have agreed (kk) [Entry date 09/16/96]

9/9/96 MEMORANDUM OPINION AND ORDER by Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS: denying motion by defendant SUN-DIAMOND GROWERS to dismiss count(s) 1-2, 3-4, 5, 6-9 of the indictment [55-1] (N) (kk) [Entry date 09/16/96][1]

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[1] The official docket incorrectly states that this order denied Sun-Diamond Growers' motion to dismiss counts 5 and 6-9. The parties agree that this order addressed counts 1 through 9. The entry above has been corrected accordingly.

9/24/96 JURY TRIAL before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS (1) count(s) 1-2, 3-4, 5, 6-9: Same jury. Deliberations resumed and concluded. Verdict of guilty rendered as to SUN-DIAMOND GROWERS (1) count(s) 1, 3-4, 5, 6-9. Sentence set for 9:00 12/10/96 for SUN-DIAMOND GROWERS . , Verdict of not guilty rendered as to SUN-DIAMOND GROWERS (1) count(s) 2 . , SUN-DIAMOND GROWERS referred for pre-sentence investigation report, Defendant given until 10/14/96 to file post-trial motions, oppositions due 10/25/96, replies due 10/30/96. Reporter: William D. McAllister (mlp) [Entry date 09/26/96]

10/10/96 TRANSCRIPT filed as to SUN-DIAMOND GROWERS for date of 9/18/96. Reporter: William McAllister (mln) [Entry date 10/11/96]

10/21/96 TRANSCRIPT (Excerpt) of jury trial before Judge Urbina filed as to SUN-DIAMOND GROWERS for date of 9/17/96. Reporter: William D. McAllister (Volume 7) (kk) [Entry date 10/22/96]

5/28/97 NOTICE OF APPEAL filed by defendant SUN-DIAMOND GROWERS from Court's oral sentence imposed on 5/13/97 and entered on 5/19/97. Appeal references SUN-DIAMOND GROWERS (1), count(s) 1, 3-4, 5, 6-9. Counsel and defendant(s) notified. Docketing statement not received. (Blank Docketing Statement mailed to defense counsel) USCA fee: $100.00 USDC fee: $5.00 (kk) [Entry date 06/02/97]

6/5/97 JUDGMENT and Probation Order issued by Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS. (mlp) [Entry date 06/06/97]

Relevant Docket Entries From Circuit Court

6/6/97 CRIMINAL CASE docketed. Notice of Appeal filed by Appellant Sun Diamond Growers. [277008-1] (jth)

9/15/97 BRIEF filed by Appellant Sun Diamond Growers [296499-1]. Copies: 15. Certificate of service date 9/15/97. (lej)

9/15/97 BRIEF lodged by Movant-Amicus Amer Leag Lobbyists [296557-1] Copies: 15. Certificate of service date 9/15/97. (wmw)

10/16/97 CORRECTED BRIEF filed by Appellee USA [303230-1]. Copies: 16. Certificate of service date 10/16/97. (jth)

10/29/97 REPLY BRIEF filed by Appellant Sun Diamond Growers [306660-1]. Copies: 15. (Certificate of personal service dated 10/29/97). (jth)

12/11/97 ORAL ARGUMENT HELD before Williams, Henderson, Tatel. (sgh)

12/19/97 TRANSCRIPT of oral argument held on 12/11/97. [277005-1] (jth)

3/20/98 JUDGMENT for the reasons in the accompanying opinion reversing and remanding for a new trial on Count I [339408-1], affirming the convictions on Counts III - IX [339408-2], vacating Sun-Diamond's sentence [339408-3], and remanding case to the USDC for further proceedings consistent with the opinion filed this date [339408-4]. Before Judges Williams, Henderson, Tatel. (edb)

3/20/98 OPINION (30 pgs) for the Court filed by Judge Williams. (edb)

5/4/98 PETITION for rehearing [350207-1], SUGGESTION for rehearing in banc [350208-2] (20 copies) filed by Sun Diamond Growers (certificate of service dated 5/4/98) (jth)

5/4/98 PETITION for rehearing [350208-1], SUGGESTION for rehearing in banc [350208-2] (19 copies) filed by Appellee USA. (certificate of service dated 5/4/98) (jth)

5/6/98 CLERK'S ORDER filed directing appellant to file a response [350595-1] to the petition/suggestion for rehearing in banc of the USA [350208-1] and do so on or before May 21, 1998. (jth)

5/21/98 RESPONSE filed [354167-1] by Appellant Sun Diamond Growers to Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc (certificate of service dated 5/21/98). (jth)

6/18/98 PER CURIAM ORDER filed denying the petitions for rehearing of appellant [350207-1], and appellee [350208-1], filed on May 4, 1998. (Mandate may issue on or after 6/26/98). Before Judges: Williams, Henderson, and Tatel. (jth)

6/18/98 PER CURIAM ORDER, In Banc, filed denying appellant's suggestion for rehearing in banc [350207-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland. [Circuit Judges Sentelle and Garland did not participate in this matter]. (jth)

6/18/98 PER CURIAM ORDER, In Banc, filed denying appellant's suggestion for rehearing in banc [350208-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland. [A statement of Circuit Judge Wald concurring in the denial of rehearing in banc is attached]. [Circuit Judges Sentelle and Garland did not participate in this matter]. (jth)

7/17/98 PER CURIAM ORDER filed amending opinion filed on 3/20/98 by Circuit Judge Stephen F. Williams [339409-1]. SEE ORDER FOR DETAILS. Before Judges Williams, Henderson, Tatel. (edb)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grand Jury Sworn in on January 6, 1995
Holding a Criminal Term

INDICTMENT

Criminal No. 96-0193

UNITED STATES OF AMERICA,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Defendant.

Violations:

18 U.S.C. 201(c)(1)(A)
(Gratuity)

18 U.S.C. §§ 1343, 1346
(Wire Fraud)

2 U.S.C. § 441b(a)
(Corporate Campaign Contribution)

2 U.S.C. § 441f
(Conduit Campaign Contribution)

18 U.S.C. §
(Aiding and Abetting)

THE GRAND JURY CHARGES:

COUNT ONE

I. INTRODUCTION

At all times material to this Indictment:

1. Defendant SUN-DIAMOND GROWERS OF CALIFORNIA (hereafter defendant SUN-DIAMOND) was a California agricultural cooperative corporation. Defendant SUN-DIAMOND's principal offices were in Pleasanton, California.

2. Defendant SUN-DIAMOND was owned by five member cooperatives which, in turn, were owned by a total of approximately 4,500 growers. The five member cooperatives, who are not named as defendants in this indictment, were:

A. Sun-Maid Growers of California;

B. Diamond Walnut Growers, Inc.;

C. Sunsweet Growers, Inc.;

D. Valley Fig Growers; and

E. Hazelnut Growers of Oregon.

3. Defendant SUN-DIAMOND and its member cooperatives grew, processed, packaged, marketed and sold, among other products, raisins, walnuts, prunes, figs, and hazelnuts. Each member cooperative was the largest producer of commodities in its respective industry.

4. Defendant SUN-DIAMOND assisted the member cooperatives primarily by handling their marketing and dealing with federal agencies in Washington, D.C., such as the United States Department of Agriculture. Defendant SUN-DIAMOND pursued matters of importance to SUN-DIAMOND with the Department of Agriculture and Secretary of Agriculture Alphonso Michael Espy (hereafter Secretary of Agriculture Michael Espy), not named as a defendant herein.

5. SUN-DIAMOND Senior Corporate Officer X, whose identity is known to the Grand Jury, but is not named as a defendant in this Indictment, was, on behalf of SUN-DIAMOND and the member cooperatives, in charge of and responsible for, among other things:

A. Dealing with the Secretary of Agriculture and decision makers at the Department of Agriculture; and

B. Directing SUN-DIAMOND's federal government lobbying activities and representatives, which included James H. Lake, not named as a defendant herein;

6. The United States Department of Agriculture was a department of the United States Government. The duties of the Department of Agriculture were and are, among other things, to improve and promote agricultural development and production in the United States and the promotion of United States agricultural products in other countries. The Secretary of Agriculture was and is in charge of the Department of Agriculture.

7. In or about December 1992, President-Elect William Jefferson Clinton advised Michael Espy that he would nominate him to be the Secretary of Agriculture. From that time forward, Michael Espy became subject to the provisions of federal law which, in part and among other things, made it unlawful for companies such as defendant SUN-DIAMOND to give things of value to Michael Espy for and because of official acts performed or to be performed by him.

8. On or about January 14, 1993, the United States Senate Committee on Agriculture, Nutrition and Forestry considered the nomination of Michael Espy to be Secretary of Agriculture. Michael Espy was confirmed by the United States Senate on January 21, 1993. Michael Espy served as the Secretary of Agriculture from January 22, 1993 until December 31, 1994.

II. SUN-DIAMOND ISSUES INVOLVING THE DEPARTMENT OF AGRICULTURE

9. In 1993 and 1994, defendant SUN-DIAMOND and its member cooperatives had questions, matters, and issues pending with the Department of Agriculture and Secretary of Agriculture Michael Espy. In part these included:

A. MARKET PROMOTION PROGRAM

10. During 1993 and 1994, the Department of Agriculture administered a grant program designed to increase export sales of certain U.S. agricultural commodities abroad, including prunes, raisins, and walnuts. This program was and is known as the Market Promotion Program ("MPP").

11. In part and among other things, under the MPP, the Department of Agriculture, acting through the Secretary of Agriculture, was authorized to award government funds to trade organizations, if the Secretary of Agriculture determined that such organizations would significantly contribute to the sale of United States farm commodities in foreign countries.

12. To receive money to market their commodities in foreign countries, trade organizations submitted marketing plan applications to the Department of Agriculture. By law, the Secretary of Agriculture had to approve the award of MPP money to each trade organization. The trade organizations would in turn award money to companies, like the member cooperatives of defendant SUN-DIAMOND, to pay for part of their marketing campaigns in foreign countries.

13. Since the inception of the MPP program, the major SUN-DIAMOND member cooperatives applied for and obtained MPP money from trade organizations in which they participated. Each of the defendant SUN-DIAMOND member cooperatives was the largest member of its respective trade organization.

1994 MPP Allocations

14. The ability and capability to sell raisins, prunes, and walnuts abroad was of substantial importance to defendant SUN-DIAMOND member cooperatives.

15. During May 1994, the Department of Agriculture allocated $2,180,000 to the California Prune Board, the trade organization that administered MPP funds for prunes, $3,520,000 to the Raisin Administrative Committee, the trade organization that administered MPP funds for raisins, and $2,890,000 to the California Walnut Commission, the trade organization that administered MPP funds for walnuts. A portion of MPP funds to each trade organization was dedicated to the sale of brand name commodities such as Sun-Maid raisins, or Sunsweet prunes, and the remainder was dedicated to advertising such commodities generally.

16. During 1994, the California Walnut Commission dedicated $45,941 to the marketing of brand name walnuts. Diamond Walnut Growers received all such brand name dedicated funds, or 100 percent. In 1994, the California Prune Board dedicated $2,362,685 of its MPP funds to the marketing of brand name prune products and Sunsweet Growers received $1,232,000 of such funds, or 52 percent. The Raisin Administrative Committee dedicated $445,750 of its MPP funds to brand name marketing and Sun-Maid Growers received $165,000 of such funds, or 32 percent. The remainder of all such MPP funds was spent on advertising raisins, prunes, and walnuts generally in selected foreign countries, which also benefitted Sun-Maid Growers, Sunsweet Growers, and Diamond Walnut Growers as they sold their products in such countries.

17. Obtaining MPP funds for fiscal year 1994 was a matter of importance to SUN-DIAMOND and its major member cooperatives, Diamond Walnut Growers, Sunsweet Growers, and Sun-Maid Growers of California.

18. In or about April and May 1994, there were questions and matters pending before the Department of Agriculture concerning whether California raisin producers, including Sun-Maid Growers of California, would be able to receive MPP funds because the raisin trade organization to which they belonged and which had applied to USDA for MPP funds would not exist after July 31, 1994.

SUN-DIAMOND Cooperatives and the Definition of Small-Sized Entities

19. Beginning in or about August 1993, by law, the Department of Agriculture was required to develop regulations which gave small-sized entities preference in obtaining certain MPP funds. The Department of Agriculture was deciding whether to include cooperatives in the definition of small-sized entity. If the Department of Agriculture did not consider cooperatives to be small-sized entities, this would result in some defendant SUN-DIAMOND member cooperatives receiving less MPP money.

20. Defendant SUN-DIAMOND wanted Secretary of Agriculture Michael Espy to: (a) cause the Department of Agriculture to promulgate MPP regulations that would allow defendant SUN-DIAMOND member cooperatives to receive the preferences provided for small sized entities, and (b) continue to study the issue with a view to giving cooperatives the preferences due small sized entities.

B. METHYL BROMIDE

21. Methyl Bromide was a chemical that was used to kill pests and other insects when planting orchards and fields. It was also used to kill pests after a commodity was harvested. Certain of defendant SUN-DIAMOND's member cooperatives used methyl bromide for, among other uses, post-harvest fumigation of walnuts, prunes, and figs. Methyl bromide was a low cost, effective pesticide.

22. In 1992, the Environmental Protection Agency had announced plans to promulgate a rule which would phase out and ultimately bar the use of methyl bromide in the United States. This proposed rule included a prohibition of the use of methyl bromide as a fumigant on commodities that were exported by defendant SUN-DIAMOND's member cooperatives to other countries.

23. In 1993 and 1994, defendant SUN-DIAMOND and particularly Diamond Walnut, were concerned that the loss of methyl bromide and lack of a viable alternative for methyl bromide would hurt their ability, among other things, to sell their products. Defendant SUN-DIAMOND sought the assistance of the Department of Agriculture, in part and among other things, to persuade the Environmental Protection Agency to delay promulgating the rule to phase out and eliminate the use of methyl bromide and to mitigate the adverse effects of any such rule, when such rule was formally proposed on or about March 18, 1993.

24. Defendant SUN-DIAMOND also sought to have the Department of Agriculture increase its funding for research for alternatives to methyl bromide in the event that use of methyl bromide were restricted or prohibited.

III. THINGS OF VALUE GIVEN TO SECRETARY OF AGRICULTURE MICHAEL ESPY BY DEFENDANT SUN-DIAMOND

25. From on or about January 5, 1993, through on or about March 11, 1994, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, spent or caused defendant SUN-DIAMOND to spend approximately $14,287 of SUN-DIAMOND corporate funds in the course of entertaining and providing things of value to Secretary of Agriculture Michael Espy and the Secretary's girlfriend, not named as a defendant herein. Of the total amount spent by defendant SUN-DIAMOND's Senior Corporate Officer X, approximately $5,913 was spent directly on Secretary of Agriculture Michael Espy. The remaining balance of

defendant SUN-DIAMOND money, approximately $8,374, was largely used by Senior Corporate Officer X to pay for the expenses of himself, Secretary of Agriculture Michael Espy's girlfriend, and Senior Corporate Officer X's own girlfriend when Senior Corporate Officer X was entertaining Secretary of Agriculture Michael Espy.

26. Defendant SUN-DIAMOND's Senior Corporate Officer X used a personal credit card or caused defendant SUN-DIAMOND to pay the seller directly to purchase the things of value for Secretary of Agriculture Michael Espy that are referenced in this Count of the Indictment. Senior Corporate Officer X submitted reimbursement requests to SUN-DIAMOND for the cost of the things of value that he provided to Secretary of Agriculture Michael Espy.

27. Defendant SUN-DIAMOND reimbursed Senior Corporate Officer X for all of the money he spent for things of value provided to Secretary of Agriculture Michael Espy in this Count of the Indictment in accordance with defendant SUN-DIAMOND's Policy Statement Number P-3, Expense Control and Reporting, which stated in pertinent part:

> "Entertainment expenses which are reimbursed are those ordinary and necessary costs that employees are required to incur for hospitality extended to individuals in sales promotion and in establishing or maintaining business relationships. These expenditures associated with the active conduct of business are reimbursed only if the entertainment precedes or follows a bona fide business discussion."

A. TICKETS, MEALS AND LIMOUSINES FOR THE UNITED STATES OPEN TENNIS TOURNAMENT

28. On or about September 10, 1993, SUN-DIAMOND Senior Corporate Officer X, Secretary of Agriculture Michael Espy, and their girlfriends traveled from the District of Columbia to New York City to attend the U.S. Open Tennis Tournament.

29. On or about September 11 and September 12, 1993, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, paid approximately $9,183 for tickets, limousines, and meals for Secretary of Agriculture Michael Espy and the Secretary's girlfriend, and for Senior Corporate Officer X and his girlfriend to attend two tennis matches at the U.S. Open Tennis Tournament in Flushing Meadows, New York. Defendant SUN-DIAMOND's Senior Official X spent approximately $2,295 of the $9,183 for tournament tickets, meals, and limousines provided directly to Secretary of Agriculture Michael Espy.

B. LUGGAGE

30. On or about January 20, 1993, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, purchased and gave to Secretary of Agriculture Michael Espy five pieces of Hartmann luggage at a total cost of $2,427 and gave that luggage to Secretary of Agriculture Michael Espy.

C. MEALS AT RESTAURANTS

31. From on or about January 5, 1993, through on or about March 11, 1994, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, spent approximately $2,152 to provide meals and entertainment to Secretary of Agriculture Michael Espy and others at restaurants and at a barbecue. The amount of money defendant SUN-DIAMOND spent for food directly served to Secretary of Agriculture Michael Espy was approximately $665.

D. OTHER THINGS OF VALUE

32. On or about October 28, 1993, November 9, 1993, and January 17, 1994, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, spent or caused defendant SUN-DIAMOND to spend approximately $524 to buy and provide a framed print, packing for the print, and a crystal bowl for Secretary of Agriculture Michael Espy.

33. From on or about January 5, 1993, through on or about March 11, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, did knowingly, directly and indirectly, give, offer and promise things of value as set forth above, to a public official, namely: Alphonso Michael Espy, the Secretary of Agriculture, and to Alphonso Michael Espy, a person selected to be a public official, namely: the Secretary of Agriculture, for and because of official acts performed and to be performed by Alphonso Michael Espy, otherwise than as provided by law for the proper discharge of official duty.

(In violation of Title 18, United States Code, § 201(c)(1)(A) and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

1. Paragraphs 1 through 24 of Count One of this Indictment are realleged and incorporated by reference as though set forth in full.

2. The International Nut Council was and is composed of growers, handlers, brokers, agents, exporters and others, including Diamond Walnut Growers of California, who work to expand the worldwide consumption of tree nuts. It was important to the International Nut Council to have Secretary of Agriculture Michael Espy speak to its members at their IX World Tree Nut Congress which was to be held May 22-24, 1993 in Athens, Greece.

3. Diamond Walnut Growers of California, a member cooperative of the defendant SUN-DIAMOND, was a member of the International Nut Council. The President of Diamond Walnut was a member of the International Nut Council Executive Committee. Diamond Walnut wanted to

increase its export of walnuts to other countries and, in part, used the International Nut Council to achieve this objective.

4. In or about January 1993, Officer Y of the International Nut Council, whose identity is known to the Grand Jury, but is not a defendant herein, talked to defendant SUN-DIAMOND's Senior Corporate Officer X to have Senior Corporate Officer X help arrange for Secretary of Agriculture Michael Espy to attend and speak at the Athens World Tree Nut Congress.

5. As a result of these discussions, on or about February 9, 1993, the International Nut Council, acting through Senior Corporate Officer X, invited Secretary of Agriculture Michael Espy to speak at the IX World Nut Congress in Athens.

6. On or about April 7, 1993, Secretary of Agriculture Michael Espy wrote to Officer Y of the International Nut Council, in care of defendant SUN-DIAMOND's Senior Corporate Officer X, to advise that Senior Corporate Officer X would be involved in working out the details of Secretary Espy's appearance at the Athens Congress.

7. In or about April 1993, in one or more telephone discussions regarding whether Secretary of Agriculture Michael Espy would attend the World Nut Congress, defendant SUN-DIAMOND's Senior Corporate Officer X suggested to Officer Y of the International Nut Council that the Nut Council provide a first class airplane ticket costing about $7,000, so that Secretary of Agriculture Michael Espy could take his girlfriend to Athens. Officer Y of the International Nut Council agreed to pay the cost of a business class airplane ticket, approximately $3,100, for Secretary of Agriculture Michael Espy's girlfriend.

8. On or about May 13, 1993, in the District of Columbia, SUN-DIAMOND Senior Corporate Officer X gave Secretary of Agriculture Michael Espy's girlfriend approximately $3,100 in cash to pay for the cost of her airplane ticket to Athens.

9. On May 21, 1993 Secretary of Agriculture Michael Espy and his girlfriend flew to Athens, where they attended part of the IX World Tree Nut Congress. Defendant SUN-DIAMOND Senior Corporate Officer X and his girlfriend were also at the Congress as well as a delegation from Diamond Walnut Growers.

10. During this time, defendant SUN-DIAMOND's Senior Corporate Officer X entertained Secretary of Agriculture Michael Espy and Secretary Espy's girlfriend at restaurants in Athens. Secretary Espy and his girlfriend spent May 25, 1993 in Rome and returned to the District of Columbia, on May 26, 1993.

11. On or about July 30, 1993, Officer Y of the International Nut Council caused a wire transfer in the amount of $3,140 to be sent from the International Nut Council's bank in Spain to defendant SUN-DIAMOND's Senior Corporate Officer X's bank account in California, as reimbursement to Senior Corporate Officer X for the cash he had given to Secretary Espy's girlfriend to pay for her airplane ticket.

12. In or about May 1993, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, did knowingly, directly and indirectly, give, offer and promise a thing of value, namely: approximately $3,100 and the benefit thereof, to a public official, namely: Alphonso Michael Espy, the Secretary of Agriculture, for and because of official acts performed and to be performed by Alphonso Michael Espy, otherwise than as provided by law for the proper discharge of official duty.

(In violation of Title 18, United States Code, §201(c)(1)(A) and Title 18, United State Code, §2)

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

I. INTRODUCTION

1. Paragraphs 1 through 8 of Count One are realleged and incorporated by reference herein as though set forth in full.

2. At all times relevant to Count Three of the Indictment:

II. ROBINSON LAKE SAWYER MILLER

3. James H. Lake, not named as a defendant in this Indictment, was a founding partner of Robinson, Lake, Lerer & Montgomery, Inc., d/b/a "Robinson Lake Sawyer Miller" (hereafter, "RLSM").

4. RLSM's principal place of business was in New York, New York.

5. In addition to its New York operation, RLSM conducted business through its District of Columbia office. This Count concerns the activities of the District of Columbia office of RLSM.

6. James H. Lake was in charge of the District of Columbia office and held the position of chairman of the board of directors of Robinson, Lake, Lerer & Montgomery, Inc.

7. RLSM was owned and controlled by, and was a wholly-owned subsidiary of Bozell Worldwide, Inc. (hereafter "Bozell, Inc."), which in turn was and is owned and controlled by Bozell, Jacobs, Kenyon & Eckhardt, Inc., a Delaware corporation, with its principal place of business in New York, New York.

8. A principal part of RLSM's business was lobbying and public relations, including business related to the Department of Agriculture.

9. Defendant SUN-DIAMOND was one of the most important and oldest agricultural clients of RLSM.

10. In part and among other things, defendant SUN-DIAMOND's Senior Corporate Officer X supervised defendant SUN-DIAMOND's relationship with RLSM and the activities of James H. Lake. Senior Corporate Officer X used an office at RLSM, when he was conducting his business for defendant SUN-DIAMOND in the District of Columbia.

11. RLSM handled, in part, defendant SUN-DIAMOND's public relations and lobbying activities, including representing defendant SUN-DIAMOND's interests before the Department of Agriculture. Defendant SUN-DIAMOND paid RLSM a $20,000 per month retainer, plus expenses.

III. THE HENRY ESPY CAMPAIGN

12. The Federal Election Commission (hereinafter "FEC") was the agency of the United States Government entrusted with responsibility for enforcement of the reporting requirements of the Federal Election Campaign Act, 2 U.S.C.§§431-455 (hereinafter "FECA"), and for the detection, investigation, and institution of enforcement actions arising from violations of FECA. The FEC was also responsible for collecting and making available to the public specific and accurate information concerning the identity of contributors to federal candidates such as Henry Espy.

13. On or before January 5, 1993, Henry Espy, not named as a defendant in this Indictment, publicly announced his candidacy for the Democratic Party nomination for the United States Congress from the State of Mississippi in a special primary election.

14. Henry Espy sought election to become the Democratic nominee for the Mississippi Congressional District seat being vacated by his brother, Michael Espy, when Secretary of Agriculture Michael Espy resigned his Congressional seat to accept the position of Secretary of Agriculture.

15. On or about March 30, 1993, Henry Espy lost the special primary election for Congress. As a result of Henry Espy's unsuccessful campaign for the

Democratic Party nomination, campaign debts were incurred. By in or about March 1994, the campaign debt was approximately $120,000.

16. The Henry Espy for Congress Committee was registered as the principal campaign committee for Henry Espy with the FEC and was designated and authorized by Henry Espy, pursuant to FECA, to receive contributions and make expenditures in connection with his 1993 candidacy for the United States Congress. The Henry Espy for Congress Committee was subject to the reporting provisions and the campaign financing limitations of FECA.

17. The Henry Espy for Congress Committee was required under FECA, specifically, Title 2 United States Code §434, to file periodic reports with the FEC, which reports were required to reflect the true identities of all individuals and entities who contributed in excess of $200 to support the candidacy of Henry Espy in any given calendar year.

18. FECA, namely Title 2 United States Code §441b, prohibited entirely and rendered unlawful contributions by corporations, whether directly or indirectly, in connection with the campaign of a candidate for the United States Congress.

19. FECA, namely Title 2 United States Code, §441f, prohibited entirely and rendered unlawful the making of a contribution in the name of another person, including

contributions made by individuals who are reimbursed for such contributions.

20. The violations of FECA alleged herein related to the making of contributions that aggregated more than $2,000 during the calendar year 1994.

IV. THE SCHEME TO DEFRAUD

21. From in or about March 1994 through in or about June 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND's Senior Corporate Officer X, and James H. Lake, devised and intended to devise a scheme and artifice to defraud and to deprive another, namely, Bozell, Inc. and RLSM, of the intangible right of honest services of James H. Lake, and for obtaining money and property from Bozell, Inc. by, among other things:

A. creating and causing the creation of a false expense report seeking reimbursement from Bozell, Inc. of money purportedly expended by James H. Lake for the benefit, and on behalf of defendant SUN-DIAMOND;

B. falsifying and causing the falsification of the financial books and records of Bozell, Inc.; and

C. causing Bozell, Inc. to advance funds for the purpose of concealing an illegal corporate campaign contribution by defendant SUN-DIAMOND to help retire the campaign debt of Henry Espy;

all by means of false and fictitious pretenses, representations, and promises, well-knowing at the time that the pretenses, representations, and promises, when they were made to Bozell, Inc., would be and were false and fictitious.

20. It was a part of the scheme and artifice to defraud that in or about March, 1994 during several conversations:

A. Defendant SUN-DIAMOND's Senior Corporate Officer X told James H. Lake that Secretary of Agriculture Michael Espy wanted help from Senior

Corporate Officer X in raising money to retire Henry Espy's campaign debt. Senior Corporate Officer X solicited James H. Lake's assistance in a scheme to raise approximately $5,000 to help retire the campaign debt of Henry Espy.

B. James H. Lake and Senior Corporate Officer X agreed that they would use $5,000 of defendant SUN-DIAMOND's corporate funds to contribute to the campaign of Henry Espy for Congress, in violation of FECA.

C. James H. Lake agreed to enlist the assistance of four other officers and employees of the District of Columbia office of RLSM to make personal contributions, each in the amount of $1,000.

D. James H. Lake agreed with Senior Corporate Officer X that defendant SUN-DIAMOND corporate funds would be used to reimburse the contributions made in the names of the RLSM employees.

E. After on or about March 1, 1994, James H. Lake agreed with Senior Corporate Officer X that the reimbursement of the campaign contributors would be accomplished by having RLSM bill defendant SUN-DIAMOND for a false and fictitious expense to conceal the contribution by defendant SUN-DIAMOND and the reimbursement to the five campaign contributors, including James H. Lake.

F. James H. Lake and Senior Corporate Officer X agreed that RLSM would bill defendant SUN-DIAMOND for a false and fictitious expense for the purported purchase of a table for defendant SUN-DIAMOND at an annual fund-raising dinner (the "Dinner") held by a the District of Columbia based not-for-profit organization.

G. On or about March 10, 1994, James H. Lake, by virtue of his position and authority at RLSM, created a false and fictitious expense for the Dinner and requested reimbursement from Bozell, Inc. in the amount of $5,000,

thereby creating false and fictitious entries on Bozell, Inc.'s books and records.

H. On or about March 14, 1994, James H. Lake caused Bozell, Inc. to issue a check in the amount of $5,000 as reimbursement to James H. Lake for funds purportedly expended for the Dinner on behalf of RLSM's client, defendant SUN-DIAMOND.

I. From on or about March 3, 1994, until on or about March 18, 1994, James H. Lake solicited four other officers and employees of the District of Columbia office of RLSM to each contribute $1,000 to the Henry Espy for Congress Committee. James H. Lake promised each of these officers and employees that their campaign contributions would be reimbursed. Three of these individuals did as James H. Lake requested; the fourth individual refused.

J. From on or about March 3, 1994, until on or about March 24, 1994, James H. Lake, on behalf of defendant SUN-DIAMOND, reimbursed himself and three officers and employees of the District of Columbia office of RLSM, each in the amount of $1,000, for their campaign contributions to the Henry Espy campaign.

K. In or about March 1994, James H. Lake provided to defendant SUN-DIAMOND Senior Corporate Officer X four checks — one from James H. Lake, and three others from officers and employees of the District of Columbia office of RLSM — each in the amount of $1,000 payable to the Henry Espy for Congress Committee.

L. James H. Lake retained approximately $1,000 of the $5,000 amount reimbursed to him from Bozell, Inc. as a consequence of the submission of a false and fictitious billable expense report.

M. On or about April 26, 1994, James H. Lake, by virtue of his position and authority at RLSM, caused RLSM to bill defendant SUN-DIAMOND $26,162.66,

which included the false and fictitious $5,000 expense for the Dinner.

N. On or about April 27, 1994, defendant SUN-DIAMOND's Senior Corporate Officer X, in his capacity as an officer of defendant SUN-DIAMOND, approved for payment RLSM's invoice containing the $5,000 expense for the Dinner.

O. On or about June 2, 1994, defendant SUN-DIAMOND sent a check for $26,162.66, payable to RLSM, which included defendant SUN-DIAMOND's reimbursement to RLSM for payment of the false and fictitious $5,000 expense for the Dinner which RLSM had earlier reimbursed to James H. Lake.

21. On or about April 1, 1994, in the District of Columbia, defendant SUN-DIAMOND's Senior Corporate Officer X opened a bank account at a District of Columbia bank in the name of: "Henry Espy for Congress." Senior Corporate Officer X had sole signature authority over this bank account. Senior Corporate Officer X deposited and caused to be deposited the four $1,000 checks referenced above to the Henry Espy for Congress account.

22. On or about March 1, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted in interstate commerce, by means of a wire communication, that is: a telephonic call between defendant SUN-DIAMOND's Senior Corporate Officer X in California and James H. Lake's office at RLSM, in the District of Columbia, writings, signs, signals, pictures and sounds, that is: among other things, a message that Senior Corporate Officer X needed to speak with James H. Lake.

(In violation of Title 18, United States Code, §§ 1343 and 1346, and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT FOUR

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. On or about March 11, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted, in interstate commerce, by means of a wire communication, that is: a telephonic communication by computer modem between RLSM, in the District of Columbia, and Bozell, Inc., in Omaha, Nebraska, writings, signs, signals, pictures and sounds, that is: a billable expense report requesting reimbursement for a $5,000 expense for the purchase of a table at the Dinner.

(In violation of Title 18, United States Code, §§ 1343, 1346 and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT FIVE

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made a contribution and expenditure aggregating $2,000 and more in calendar year 1994, in violation of the prohibition against corporate contributions contained in the Federal Election Campaign Act, namely: a contribution and expenditure

totaling $4,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441b(a) and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT SIX

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of James H. Lake, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT SEVEN

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of A, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT EIGHT

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another

person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of B, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT NINE

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of C, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

A TRUE BILL:

Foreperson
Grand Jury 95-1
June 13, 1996

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-131

In The

Supreme Court of the United States

October Term, 1998

THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. § 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
I. "For or Because of Any Official Act Performed or to Be Performed" Is Not the Same as "For or Because of the Official's Position."	12
A. The District Court's Instructions Stripped the Jury of its Fact-Finding Function	12
B. The Gratuity Statute's Legislative History Confirms That Congress Intended to Criminalize Only Gifts to Public Officials That Relate to an "Official Act."	25
C. The Supreme Court Authority Relied upon by the Independent Counsel Supports Sun-Diamond's Position	30
II. The Gratuity Statute Proscribes Rewards for Past Official Action and Gifts to Increase the Likelihood of One or More Specific, Favorable Acts	36
III. The District Court's Error Was Far From Harmless	45
CONCLUSION	50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ardestani v. Immigration & Naturalization Servs., 502 U.S. 129 (1991) 14

Brogan v. United States, 522 U.S. 398, 118 S. Ct. 805 (1998) 13, 45

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 13

Darby v. Cisneros, 509 U.S. 137 (1993) 25

Kmart Corp. v. Cartier, Inc., 486 U.S. 281 (1987) 13

Muscarello v. United States, ___ U.S. ___, 118 S. Ct. 1911 (1998) 14

Regions Hosp. v. Shalala, 522 U.S. 448, 118 S. Ct. 909 (1998) 13

Rose v. Clark, 478 U.S. 570 (1986) 46, 49

Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469 (1997) 14

Standefer v. United States, 447 U.S. 10 (1980) 31, 32, 33, 35

Sullivan v. Stroop, 496 U.S. 478 (1990) 13

Sullivan v. Louisiana, 508 U.S. 275 (1993) 46, 49

United States v. Aguilar, 515 U.S. 593 (1995) 22, 45

United States v. Brewster, 408 U.S. 501 (1972) 30, 31

TABLE OF AUTHORITIES – Continued

Page

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 9, 22, 36

United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) 24

United States v. Carpenter, 961 F.2d 824 (9th Cir. 1992) 16

United States v. Evans, 572 F.2d 455 (5th Cir. 1978) ..24, 25

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998) 22

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) ...23, 43

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998) 23, 37, 40, 42

United States v. Mariano, 983 F.2d 1150 (1st Cir. 1993) 23, 43

United States v. Markee, 425 F.2d 1043 (9th Cir. 1970) 38

United States v. Mezzanatto, 513 U.S. 196 (1995) 45

United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991) 23

United States v. Nardello, 393 U.S. 286 (1969) 22

United States v. Patel, 32 F.3d 340 (8th Cir. 1994) 23, 42

United States v. Previte, 648 F.2d 73 (1st Cir. 1981)...23, 40

United States v. R.L.C., 503 U.S. 291 (1992) 45

United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) 14, 16, 23

United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) 32, 33

TABLE OF AUTHORITIES – Continued

Page

United States v. Strand, 574 F.2d 993 (9th Cir. 1978)..22, 43

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 45

Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202, 117 S. Ct. 660 (1997) 38

STATUTES

5 U.S.C. § 7353 44

18 U.S.C. § 2 .....3, 32

18 U.S.C. § 2(b) 38

18 U.S.C. § 116 38

18 U.S.C. § 201 33

18 U.S.C. § 201(a)(3) 2, 14

18 U.S.C. § 201(b) 15, 33, 43

18 U.S.C. § 201(b)(1)(A) 21

18 U.S.C. § 201(c)(1) 2

18 U.S.C. § 201(c)(1)(A) 1, 3, 9, 11, 43

18 U.S.C. § 201(f) 2, 27, 31

18 U.S.C. § 201(g) 2

18 U.S.C. § 203 24

18 U.S.C. § 372 38

18 U.S.C. § 1020 38

18 U.S.C. § 1954 43

18 U.S.C. § 4045 38

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 7214(a)(2) 32, 34

28 U.S.C. § 593(b) 2

OTHER SOURCES

5 C.F.R. § 2635.202(a) 44

9 C.F.R. § 203.2 44

107 Cong. Rec. 21986-87 (daily ed. Oct. 3, 1962) 29

H.R. 3050, Title I, § 9(b) 25, 26

H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961) ... 25, 27

S. 3306, 85th Cong. (1958) 27

S. Rep. No. 2213, 87th Cong., 2d Sess. (1962) 28

Fed. R. Crim. P. 25(b) 38

Conflicts of Interest: Hearing on H.R. 8150 Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962) 26

Conflicts of Interest: Hearing Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962) 28

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TABLE OF AUTHORITIES – Continued

Page

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U.S. Const. art. I, § 6 30

Webster's Third New International Dictionary (1993) 38

OPINIONS BELOW

The Brief of the United States accurately reflects the opinions below. Copies of these opinions are located in the Appendix to the Petition for Writ of Certiorari ("Pet. App.").

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the final judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The Court of Appeals' decision is dated March 20, 1998, and the court denied the parties' respective petitions for rehearing and suggestions for rehearing *in banc* on June 18, 1998. This Court granted review on the question presented reflected above on November 2, 1998. *See* 119 S. Ct. 402 (1998).

STATUTORY PROVISIONS INVOLVED

This controversy involves the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), which provides in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty- . . . directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned not more than two years, or both.

Congress defined "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which

may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).[1]

STATEMENT OF THE CASE

1. Sun-Diamond is a California agricultural cooperative owned by four individual member cooperatives,[2] which in turn are collectively owned by approximately 5,000 individual growers. The conduct at issue stems from the relationship between Sun-Diamond's former Senior Vice President, Richard Douglas ("Douglas"), and former Secretary of Agriculture Alphonso Michael Espy ("Espy"). As the Court of Appeals recognized, this relationship extended beyond business acquaintances. Pet. App. 2. Douglas "had a long-time friend in Mike Espy – the two had gone to college together at Howard University and had stayed close in the years since." *Id.*; *see also* Joint Appendix filed in Court of Appeals ("C.A.J.A."), Tab 3 at 62, 165, 223, 539, 765-69; Trial Transcript ("Trans.") at 797. The Independent Counsel[3] has acknowledged the legitimacy of this friendship. *See, e.g.*, Brief of the United States ("U.S. Brief") at 4; C.A.J.A., Tab 3 at 963 ("nobody is saying that their friendship wasn't real").

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[1] The gratuity statute, 18 U.S.C. § 201(c)(1), was previously codified at 18 U.S.C. §§ 201(f), (g).

[2] The Court of Appeals erroneously stated that Sun-Diamond is owned by five member cooperatives. *See* Pet. App. 1-2. Only four of the member cooperatives have ownership interests in Sun-Diamond.

[3] On September 9, 1994, the Special Division for the Appointment of Independent Counsels appointed Donald C. Smaltz Independent Counsel to investigate alleged violations of the federal gratuity statute by Espy. *See* 28 U.S.C. § 593(b).

2. On June 13, 1996, a federal grand jury sitting in the District of Columbia, acting at the behest of the Independent Counsel, returned a nine-count indictment against Sun-Diamond. Counts I and II charged that Sun-Diamond, through Douglas, violated the gratuity statute. Count I – the only Count at issue in this appeal – alleged that Sun-Diamond expended about $5,900 on Espy's behalf: $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, $2,427 for luggage, $665 for meals, and $524 for a framed print and a crystal bowl.[4] 18 U.S.C. §§ 2, 201(c)(1)(A); *see also* Pet. App. 4.

The indictment also alleged that two U.S. Department of Agriculture ("USDA") matters affected, among others, Sun-Diamond. Joint Appendix ("J.A.") 10-13. The first matter, the Market Promotion Program ("MPP"), was a USDA grant program designed to increase export sales of U.S. agriculture commodities abroad. According to the indictment, Sun-Diamond "wanted" the USDA to treat Sun-Diamond's member cooperatives as "small-sized entities" under the MPP to enable the cooperatives to receive certain preferences in obtaining MPP funds. J.A. 12. Count I of the indictment, however, did *not* allege any nexus between Sun-Diamond's provision of things of value to Espy and the USDA's position on whether Sun-Diamond's member cooperatives fit within the definition of small-sized entities under the MPP.

The second matter concerned methyl bromide, a "low cost, effective pesticide" used to kill pests and other

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[4] In response to a jury question, the district court instructed the jury to find Sun-Diamond guilty of Count I if the jury found that any one of the gifts constituted an unlawful gratuity. *See* Trans. at 995-99.

insects when planting orchards and fields. J.A. 12. The indictment alleged that Sun-Diamond sought the assistance of the USDA to persuade the Environmental Protection Agency to delay promulgating a rule to phase-out and eliminate the use of methyl bromide "when such rule was formally proposed on or about March 18, 1993." J.A. 13. Sun-Diamond also purportedly "sought to have the [USDA] increase its funding for research for alternatives to methyl bromide in the event that use of methyl bromide were restricted or prohibited." *Id.* The indictment, however, did *not* allege that Sun-Diamond provided things of value to Espy to reward or influence Espy for any action concerning methyl bromide.

3. In fact, aside from merely charging the gratuity offense in generic statutory terms, the indictment did not specifically allege that Sun-Diamond gave gifts to Espy "for or because of" either MPP, methyl bromide or any other official act. Due to this deficiency, Sun-Diamond moved to dismiss Count I on the grounds that the gratuity statute – by prohibiting gifts to public officials "for or because of any official act performed or to be performed by such public official" – requires the prosecutor to allege and to prove some nexus between the alleged gratuities and an "official act." Pet. App. 38-47.

In denying Sun-Diamond's motion, the District Court disregarded the "official act" language, concluding instead that "it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided 'simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation.'" Pet. App. 42 (alterations and emphasis in original) (citation omitted). In

other words, "[t]he Government must [only] show that Defendant acted simply because of [the public official's] position." *Id.* (citation omitted). "[I]t is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture." Pet. App. 44.

4. It was thus no surprise when the District Court rejected Sun-Diamond's proposed instruction that "giving, offering, or promising things of value to Mike Espy unrelated to the performance of any official act is not prohibited by the gratuity statute,"[5] and instructed the jury that it could convict Sun-Diamond if the company gave things of value to Espy merely to "keep [him] happy" – even if Sun-Diamond did not intend the gifts to relate in any way to any official act:

> Now, to prove the offense of illegal gratuity, the government must prove that the defendant Sun-Diamond knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, *for or because of his official position.*
>
> * * *
>
> It is required . . . that the government prove that the gratuity was given *because of the public official's position. The gratuity may be given in appreciation for their relationship or in anticipation of its continuation.*

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[5] *See* Defendant's Proposed Jury Instructions to Which the Government Has Not Agreed at 33 (filed September 9, 1996). The District Court also rejected Sun-Diamond's request that the phrase "for or because of any official act" not be defined for the jury in light of the District Court's finding that the statutory language was clear on its face. Discussion on Jury Instructions (Vol. 7 of Trans.) at 26-27; *see also* Pet. App. at 44-45 n.8.

* * *

The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*

* * *

It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*

* * *

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.

* * *

[T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and [sic] knowingly and willingly gave the gratuities, at least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. . . . The government need not prove that the alleged*

gratuity was linked to a specific or identifiable official act or any act at all.

Pet. App. 83-87 (emphases added); *see also* Pet. App. 6-7.

The District Court then summarized the government's burden of proof when instructing that the government had to show merely that Sun-Diamond gave things of value to Espy while the company had matters pending before the USDA:

> In order to sustain its burden of proof for the crime of giving, offering or promising anything of value to the Secretary of Agriculture . . . the government must prove each of the following three elements beyond a reasonable doubt:
>
> First, at the time the gratuity was offered or promised, Michael Espy was a public official or selected to be a public official.
>
> Second, that the defendant, Sun-Diamond Growers of California, acting through Richard Douglas, its then senior vice president for corporate affairs, knowingly and willingly gave, offered or promised something of value to Michael Espy otherwise than as provided by law for the proper discharge of official duty.
>
> Third, the defendant Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, did so for or because of an official act performed or [to] be performed by Michael Espy. I will define the term, official act separately.
>
> * * *
>
> *With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture.*

Pet. App. 84-85, 88 (emphasis added).

Therefore, although the District Court instructed the jury that it must find that Sun-Diamond gave things of value to Espy "for or because of any official act performed or to be performed" and read the statutory definition of "official act," the court simultaneously instructed the jury to find Sun-Diamond guilty merely upon a finding that Sun-Diamond gave Espy things of value while the company had matters pending before the USDA. Based upon these instructions, the Independent Counsel argued to the jury that the gratuity statute required the government to prove beyond a reasonable doubt *only* that Sun-Diamond gave Espy things of value for or because of his official position.[6] Consequently, the jury was never given the opportunity to acquit Sun-Diamond if the jury found that the company gave things of value to Espy for or because of his position but *not* for or because of any official act.

On September 24, 1996, the jury convicted Sun-Diamond of Count I, and acquitted Sun-Diamond of the gratuity allegation in Count II.

5. Sun-Diamond appealed, *inter alia*, the Order Denying Sun-Diamond's Motion to Dismiss the Indictment and the gratuity conviction to the United States Court of Appeals for the District of Columbia Circuit. With regard to the gratuity conviction, the Court of Appeals concluded that the "language of the [jury] charge is far broader than that of the statute," and held that the gratuity statute requires a prosecutor to prove beyond a reasonable doubt that the defendant gave the gift to a public official with an intent either to reward one or more "concrete official act[s]" performed or "to

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[6] *See, e.g.*, C.A.J.A., Tab 3 at 964-66; Trans. at 3-4.

increase the likelihood of one or more specific, favorable acts" to be performed:

> To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts.
>
> * * *
>
> [I]t is enough under the gratuity statute if the defendant gives an unpromised benefit for a past government favor. And . . . a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts. In summary, as we explained in [*United States v.*] *Brewster*, [506 F.2d 62 (D.C. Cir. 1974),] "under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act*." 506 F.2d at 82 (emphasis added).

Pet. App. 7, 8.

The Court of Appeals also rejected the irrebuttable presumption imposed by the District Court that any gift to a public official with the capacity to benefit the donor must necessarily be "for or because of any official act":

> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands – evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before

> his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. *But the terms of the statute require a finding [by the jury] that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.*

Pet. App. 12-13 (emphasis added).

Although it reversed and remanded Sun-Diamond's Count I gratuity conviction due to the District Court's erroneous jury instructions, Pet. App. 31, the Court of Appeals "reject[ed] Sun-Diamond's broad attack on the indictment." Pet. App. 13. The court reasoned that the government does not have to show that a particular gift was earmarked for a single, particular official act. Rather, a gift given for "leniency in a multitude of specific acts was enough":

> That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute – as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely.

Pet. App. 13-14.

On June 18, 1998, the panel denied the Independent Counsel's petition for rehearing, and the full court denied his suggestion for rehearing *in banc*. Pet. App. 32-33. Judge Wald wrote a concurrence to the court's denial of the suggestion for rehearing *in banc*, recommending that this Court decide the gratuity issue. Pet. App. 34.

SUMMARY OF THE ARGUMENT

1. The plain language of the gratuity statute requires the Independent Counsel to prove beyond a reasonable doubt that Sun-Diamond gave Espy things of value "for or because of any *official act* performed or to be performed." 18 U.S.C. § 201(c)(1)(A) (emphasis added). When the District Court replaced the phrase "official act" with "official position," the court precluded Sun-Diamond from arguing – and the jury from finding – that the gifts to Espy were for or because of his official position but *not* related in any way to any official act. In effect, the instructions created an irrebuttable presumption that Sun-Diamond's gifts to Espy were "for or because of any official act" if they had any business purpose whatsoever. The record evidence shows that the gifts may have been given for a multitude of proper business purposes that are not "for or because of any official act."

The Court of Appeals' rejection of the District Court's sweeping instructions is supported not only by the clear statutory language but also by the pertinent legislative history and by the decisions of this Court and other federal circuit courts of appeals. In fact, even the Department of Justice agrees with the Court of Appeals that the gratuity statute requires the *jury* to determine whether the defendant acted with the requisite criminal intent.

2. Sun-Diamond further submits that in addition to affirming the Court of Appeals' decision, the Court should determine the appropriate scope of the gratuity instructions on remand. As the Court of Appeals concluded, by reaching only gifts for or because of official acts "performed or to be performed," the gratuity statute prohibits gifts either to reward past official action or to make certain specific, future conduct more likely. In other

words, despite the claims of the Independent Counsel and the Department of Justice, the statute does *not* criminalize gifts made merely to promote a relationship or to generate sympathy, unless also intended to affect or reward official action.

3. Regardless of the proper scope of the gratuity statute, the ultimate question of the defendant's intent is a question reserved for the jury. The District Court, however, kept this question to itself, thereby precluding the jury from considering Sun-Diamond's intent underlying its gifts to Espy. As Sun-Diamond was denied a fair trial – and might have been acquitted on all of the unlawful gratuity allegations under proper instructions – the District Court's error was far from harmless.

ARGUMENT

I. "For or Because of Any Official Act Performed or to Be Performed" Is Not the Same as "For or Because of the Official's Position."

One does not have to stray far from the question presented here – *i.e.*, whether the phrase "for or because of any official act performed or to be performed" really means "for or because of the official's position" – to discern the proper conclusion. As reflected below, the Independent Counsel's "X equals Y" argument is belied not only by the statute's plain language but also by the pertinent legislative history and ample judicial precedent.

A. The District Court's Instructions Stripped the Jury of its Fact-Finding Function.

As with any statutory interpretation, the resolution of the question presented here turns upon the pertinent

statutory language. Simply, gifts for or because of an official position are not always "for or because of any official act." The jury was thus either asked the wrong question altogether – *i.e.*, whether Sun-Diamond's gifts were for or because of Espy's position – or the District Court established an irrebuttable presumption that any gift from Sun-Diamond to Espy while the company had matters pending before the USDA was necessarily "for or because of any official act." In either case, the District Court erroneously instructed the jury because not all gifts to public officials in a position to benefit the donor are "for or because of an official act."

1. It is an unremarkable proposition that "[i]f the statute is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.' " *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citations omitted); *see also Regions Hosp. v. Shalala*, 522 U.S. 448, 118 S. Ct. 909, 915 (1998); *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1987). This Court has repeatedly underscored the importance of this general rule of statutory construction:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. *We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . .* When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (emphasis added) (citations omitted); *see also Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 811-12

(1998); *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 473-74 (1997); *Ardestani v. Immigration & Naturalization Servs.*, 502 U.S. 129, 135 (1991); *cf. Muscarello v. United States*, ___ U.S. ___, 118 S. Ct. 1911, 1923 n.11 (1998) ("It is fundamental . . . that a penal statute is not to be construed generously in the Government's favor.").

The plain language of the gratuity statute belies the Independent Counsel's argument that the phrase "for or because of any official act performed or to be performed" means "for or because of the official's position." Congress defined the term "official act" as "any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3) (emphasis added); *cf. United States v. Sawyer*, 85 F.3d 713, 735 (1st Cir. 1996) (construing a virtually identical state gratuity statute to hold that "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.' ") (quoting Mass. Gen. Laws ch. 268A §§ 1(h), (k)) (emphasis in original).

By defining "official act" as some "decision or action," Congress did not deem "official position" and "official act" to be synonyms. Although Congress broadly qualified the phrase "decision or action," Congress made clear that to violate the gratuity statute, the defendant must – at a minimum – have given a thing of value to a public official "for or because of any official [decision or action] performed or to be performed."

It *is* true that a gift "for or because of" an official decision or action necessarily is also "for or because of the official's position" because an official act is defined as a question or matter that has occurred or will occur by virtue of the official's position.[7] The converse, however, is not necessarily true because a gift may be "for or because of the official's position," but *not* "for or because of any official act performed or to be performed." As the Department of Justice acknowledges, the gratuity statute does not reach the situation where a donor bestows upon a public official a gift "while remaining indifferent as to the manner in which the recipient's official duties are performed." Brief for the United States Department of Justice As Amicus Curiae ("DOJ Brief") at 14.

The Independent Counsel's argument that the term "official act" really means "official position" fails also because Congress applied the definition of "official act" to the bribery statute. The bribery statute covers situations where a donor "directly or indirectly, corruptly gives, offers or promises anything of value" to a public official with the intent to, *inter alia*, "influence any official act." 18 U.S.C. § 201(b). Substituting "official position" for "official act" in the bribery statute renders that statute meaningless as one cannot corruptly intend to influence an official position.

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[7] *See, e.g.*, Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 67 (Comm. Print 1958) ("With minor variations, . . . official act is described as the decision, action, or vote of the recipient in some matter within his official competence."); *see also id.* at 71.

2. The District Court wholly adopted the Independent Counsel's view that if Sun-Diamond's gifts had any business component whatsoever then they *necessarily* were "for or because of any official act." *See, e.g.*, Trans. at 897 (in closing argument, the Independent Counsel argued that "[a]s long as there is a business purpose for each of [the meals] that took place, the Court has instructed that a guilty verdict must be returned"). This statutory interpretation precluded Sun-Diamond from defending the gratuity charge by demonstrating that its gifts to Espy had a business purpose but were *not* connected in any way to an official act.

A gift to a public official may have a business purpose while not being "for or because of any official act." For instance, if a lobbyist pays for a lunch with a public official as a courtesy to gain *access* to the official – *i.e.*, to give information to or receive information from the official – the lobbyist may have given a gift to a public official for reasons unrelated to an official "decision or action" performed or to be performed but nonetheless because of the official's status.[8] In the instant case, Larry Busboom ("Busboom"), Sun-Diamond's former President, testified that Douglas "as a courtesy [would] pick up the

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[8] *Cf. Sawyer*, 85 F.3d at 731 n.15 ("We do not think that the desire to gain access, by itself, amounts to an intent to influence improperly the legislators' exercise of official duties. The government points to no legislative duty to provide equal access to all members of the public; and, from a practical standpoint, we doubt one exists."); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) ("granting or denying access to lobbyists based on levels of campaign contributions is not an 'official act' [sufficient to] form the basis for a charge of extortion or attempted extortion under the Hobbs Act") (citing *McCormick v. United States*, 500 U.S. 257, 272-73 (1991)).

tab" when dining with Espy. C.A.J.A., Tab 3 at 163. Busboom testified that Douglas' "gifts" – *i.e.*, the free meals – were unrelated to "any official act":

> I think the entree to Secretary Espy was used to the benefit of our business. Again, being aware of what proposed regulations coming down the pipeline were, proposed legislation, anything of a general agricultural matter, it was important for Mr. Douglas to be on top of that. That was his job here in Washington. He was our ears and our eyes.

Id. at 164. A properly instructed jury could have found that Sun-Diamond did not violate the gratuity statute when it approved such gifts because they allowed Douglas "to maintain his information network, to make sure he was aware of any proposed regulations, legislation coming down the pipeline, [and] to be generally aware of what was going on." C.A.J.A., Tab 3 at 163; *see also id.* at 134, 163-64; Trans. at 899.

Douglas was, as any effective lobbyist would be, concerned with relaying pertinent USDA and other information to Sun-Diamond to enable the company to be well-informed and to react appropriately. There was no better place to learn of pertinent USDA events than from the Secretary of Agriculture himself. And in addition to fostering Douglas' information network, his "gifts" to Espy allowed Douglas to be seen with the Secretary of Agriculture, thus "enhanc[ing] Mr. Douglas' stature in the community here in Washington." C.A.J.A., Tab 3 at 165. This, in turn, made "him more effective" as a lobbyist because Douglas, through Espy, was introduced to, and taken seriously by, other high-level government officials. *Id.*

While the Independent Counsel would have this Court, and most certainly the jury, believe that lobbyists have a single function – to influence government officials in the exercise of their authority – the reality is quite different. The primary function of a lobbyist is to keep the client well-informed, enabling the client to make educated business decisions. In such instances, the only "acts" to be influenced are those of a private, commercial nature, not official acts of government employees. That is not to say that lobbyists never seek to influence official acts – but so long as that is not a lobbyist's *only* function, it may not be *presumed* that a gift from a lobbyist is given for or because of an "official act." Mere networking or information gathering cannot be fairly described as "for or because of any official act." The plain language of the gratuity statute requires the jury to determine in furtherance of which objective the gift was given.

The Department of Justice – in stark contrast to the Independent Counsel's position – concedes that the Court of Appeals' decision "is consistent with" the Department's view that the gratuity statute requires *the jury* to determine the ultimate question of the defendant's intent:

> As with any element of a criminal offense, the defendant's mental state may be proved by circumstantial as well as by direct evidence. Where a thing of value is given to a government official who has the authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. *Although the jury is not required as a matter of law to draw that inference, it is generally allowed to do so; and a guilty verdict returned by a*

> *properly instructed jury on the basis of such evidence may not be set aside.*

DOJ Brief at 12-13 (emphasis added); *see also id.* at 22 n.8 ("Taken as a whole . . . the [Court of Appeals'] opinion is consistent with our approach."); *id.* at 13-14.[9]

3. While the district court initially substituted the term "official position" for "official act," thereby diminishing the intent element of the offense, the court subsequently deleted the intent element altogether. Indeed, perhaps the most egregious jury instruction error – not even addressed or referenced by the Independent Counsel – was the following:

> With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had matters pending before the United States Department of Agriculture.

Pet. App. at 88. According to this standard, which the Independent Counsel strenuously defended in the Court of Appeals,[10] Sun-Diamond was guilty of providing unlawful gratuities if it gave gifts to Espy while it had

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[9] Sun-Diamond agrees with the Department of Justice that gifts to a public official by an entity regulated by the official might provide circumstantial evidence that the gifts were given "for or because of any official act." *See* DOJ Brief at 22-24. But the District Court's elevation of such "circumstantial evidence" of unlawful intent to a dispositive finding of guilt expanded the gratuity statute well beyond its language and, most significantly, denied Sun-Diamond a fair trial.

[10] *See* Brief for Appellee filed in Court of Appeals ("C.A. Opp. Brief") at 16 ("The Government was properly allowed to prove that the gratuities were given for or because of official acts by showing that Sun-Diamond gave them while it had important issues for decision before the Secretary."); *see also id.* at 15-17.

matters pending before the USDA – regardless of whether the gifts were for or because of an official act, or for or because of an official position, or for any other purpose. The district court thus stripped the offense entirely of its principal element – some proscribed intent.

Under this standard, the parties involved in the following hypotheticals could be held criminally strictly liable under the gratuity statute – which carries a sentence of up to two years in jail – unless the gifts were given entirely out of friendship: (1) a handmade sweater given by a senior citizen to her Representative, who will soon vote on social security reform measures; (2) a gift of flowers from a litigator to a local judge – before whom the donor's law firm has cases pending – because the judge recently suffered the loss of a loved one; and (3) a large candy manufacturer which has applications pending before multiple agencies of the United States gives a jar of jelly beans to the President of the United States, who has publicly acknowledged that he occasionally craves that type of candy. In each of these hypotheticals, the gift was given to a public official who was "in a position to take official action affecting the donor." U.S. Brief at 17. But the gifts could have been given out of respect for the official's position, or, as in the case of the candy manufacturer, as an advertising or a public relations gimmick – *i.e.*, not for "any official act." *See also* Pet. App. 10-11 (Court of Appeals posits its own hypothetical illustrating the flaws in the Independent Counsel's argument).

4. The Court of Appeals' decision does not preclude, as the Independent Counsel argues, "prosecutions for the giving of gifts to, or receipt of gifts by, a person selected to be a public official." U.S. Brief at 26. In fact,

the Court of Appeals' reading of the statute does proscribe and criminalize gifts intending to reward, for instance, a Cabinet nominee for an act he has committed to take upon assuming his office, and further proscribes and criminalizes gifts intending to make a specific act more likely, again, upon a nominee assuming office.

Moreover, the Independent Counsel's discussion – which spans several paragraphs – construing the term "any" as it appears several times in the gratuity statute only diverts the Court's attention from the question presented here. *See* U.S. Brief at 21-23. No matter how many times the term "any" is used in the statute, it does not expand the scope of the criminal prohibition beyond its plain language. Sun-Diamond has never contended, nor does it now contend, that the gratuity statute applies only to specific types of official acts; a gift to a public official for or because of *any* official act (or *any* official decision or action) performed or to be performed is proscribed.

5. The Independent Counsel mistakenly accuses the Court of Appeals of "equat[ing] the offense of giving forward-looking gratuities to the far more serious offense of bribery." U.S. Brief at 16. The Court of Appeals made no such error. Instead, the Court of Appeals correctly recognized that bribery requires "a more exacting showing of intent" than the gratuity statute. Pet. App. 7; *see also* § 201(b)(1)(A). This Court has explained that "corrupt intent" as used in the bribery statute means an intent to receive a specific benefit in return for the bribe:

> An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of

> either financial gain or other benefit to oneself or a benefit to another person.

United States v. Aguilar, 515 U.S. 593, 616-17 (1995) (citation omitted).[11] An unlawful gratuity, on the other hand, does not require a corrupt intent, *i.e.*, a *quid pro quo*. Thus, where the gratuity statute "carries the concept of the official act being done anyway," the bribery law requires the giving of a thing of value to a public official with a specific and corrupt intent *to influence* certain action or inaction that the official may not have otherwise performed. *Brewster*, 506 F.2d at 82.[12] The Court of Appeals grasped this distinction when explaining that although a *quid pro quo* need not be shown to prove a violation of the gratuity statute, the "official act" language is not superfluous:

> [T]o say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. *But the gratuity statute by its terms does still require at least a unidirectional relationship – the gift must be "for or because of" the act.*

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[11] *See also United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) (defining "corrupt" as "incorporating a concept of the bribe being the prime mover or producer of the official act"); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (same proposition).

[12] *See also United States v. Nardello*, 393 U.S. 286, 293 n.11 (1969) ("Bribery has traditionally focused upon corrupt activities by public officials."); *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998) ("core difference between a bribe and a gratuity is . . . the quid pro quo").

Pet. App. 8 (emphasis added).[13] Thus, where a bribe intends to elicit a *quid pro quo*, the unlawful gratuity is a reward for either an act "performed" or a gift to make some specific future conduct more likely.[14]

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[13] Other circuit courts have read the gratuity statute to require the gifts to relate to an official decision or action. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("[a]n illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event"); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (approving a gratuity jury instruction requiring proof, "beyond a reasonable doubt, that the defendant intended to reward [the public official] for past action or action [the official] was already committed to take"); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as a reward for actions the public official has already taken or is already committed to take"); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (under gratuity statute "an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment" and "[t]he proof need not show that the payor intended to exact action by the recipient, although it must show that the payor gave the gratuity because of the act"); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (finding gratuity statute has two components: (1) gifts are made for or because of an official act; and (2) the defendant receives the gift "with a certain guilty knowledge, . . . *i.e.*, with 'knowledge that the donor was paying him compensation for an official act.' "); *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965) ("The state of mind with which the act is done is an essential element of the [gratuity] offense which the Government must prove."); *cf. Sawyer*, 85 F.3d at 736 ("statute proscribes gratuities motivated by 'official acts' rather than 'official position' ") (construing virtually identical state gratuity statute).

[14] The Independent Counsel's argument that the purpose of the gratuity statute really is to prevent government officials

Here, the District Court improperly interpreted the lack of a "*quid pro quo*" element in the gratuity statute to mean that Sun-Diamond's intent underlying the gifts to Espy was irrelevant. This relieved the Independent Counsel of his burden of proving, beyond a reasonable doubt, that Sun-Diamond intended to give the gifts to Espy "for or because of any official act performed or to be performed." That is, the District Court effectively established an irrebuttable presumption that Sun-Diamond gave gifts to Espy "for or because of an[ ] official act" simply because the company provided Espy with things of value while he was in a position to take official action affecting Sun-Diamond. In doing so, the District Court deprived Sun-Diamond of its constitutional right to present this issue to the jury.[15]

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from receiving unauthorized compensation is belied by the fact that 18 U.S.C. § 203 already explicitly covers unauthorized compensation to government employees. *See* U.S. Brief at 38-39.

[15] The cases relied upon by the Independent Counsel to support his argument that he merely needed to prove at trial that Sun-Diamond gave gifts to Espy for or because of his position are both improperly reasoned and devoid of any substantive analysis of the gratuity statute and its history. *See* U.S. Brief at 12, 38. For instance, in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), the Fifth Circuit interpreted the gratuity statute to criminalize status gratuities by relying, in part, upon decisions interpreting the conflict of interest statute, 18 U.S.C. § 203. *See id.* at 480-81. In fact, the court made *no* distinction between the intent requirements of the gratuity and conflict of interest statute – even though the latter statute has no "for or because of an official act" requirement. *Id.* No court that has cited *Evans* as support for the criminalization of status gratuities has noted the court's heavy (and, perhaps, unintended) reliance upon the intent requirement of the conflict of interest statute. Similarly, the Fifth Circuit in *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995), merely rested its conclusion upon its earlier

B. The Gratuity Statute's Legislative History Confirms That Congress Intended to Criminalize Only Gifts to Public Officials That Relate to an "Official Act."

It is "unnecessary" to track the statute's legislative history "in light of the plain meaning of the statutory text." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Nonetheless, the legislative history supports the Court of Appeals' holding and demonstrates that Congress did not intend to criminalize conduct "for or because of the official's position."

As with most legislation, the bribery, gratuity and conflict of interest statutes were subject to legislative compromise. In 1957, Chairman Emanuel Celler instructed the staff of Subcommittee No. 5 of the Committee on the Judiciary

> to prepare a detailed study and analysis of existing Federal conflict-of-interest laws to the end that they might be revised, simplified, and coordinated to prevent improper and unethical practices, while at the same time preserving the dignity of Government service and maintaining its attractiveness to competent men and women.

H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961). Representatives Celler and William M. McCulloch eventually presented identical bills, H.R. 3411 and 3412, respectively, to the 87th Congress. *Id.* Representative John Lindsay offered a similar bill, H.R. 3050, which was the result of a

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confused interpretation of the gratuity statute in *Evans*. *See id.* at 940. Nor do the other cases relied upon by the Independent Counsel even support his position. *See, e.g.*, Sun-Diamond's Brief in Opp. to Pet. for Cert. ("Pet. Opp.") at 5-14.

2-year study of the conflict of interest statutes by a special committee on conflict of interest laws of the Association of the Bar of the City of New York. *Id.* at 8. Finally, Representative Lester Holtzman introduced H.R. 7139, which was proposed by the administration. *Id.*

Section 9(b) of Representative Lindsay's bill, H.R. 3050, proposed language that would have prohibited gifts made to a public official for or because of the official's position or status:

> No person shall give, transfer, or deliver, directly or indirectly, to a Government employee any thing of economic value as a gift, gratuity, or favor if . . . such person would not give the gift, gratuity, or favor *but for such employee's office or position within the Government*[.]

H.R. 3050, Title I, § 9(b).[16] Notwithstanding Representative Lindsay's efforts, there was insufficient interest among the members of the House Judiciary Committee to adopt it. *See Conflicts of Interest: Hearing on H.R. 8150 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 36 (1962) (Statement of Hon. John V. Lindsay).

The final bill submitted by the Antitrust Subcommittee of the House Judiciary Committee, H.R. 8140, was "based upon and contain[ed] features of the provisions of H.R. 3411, H.R. 3412, H.R. 3050, and H.R. 7139." H.R.

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[16] *See also Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3411, H.R. 3412 & H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., 440-42 (1960) (discussion concerning this proposed language); *compare id.* pt. 2 at 756-60 (Letter dated Jul. 6, 1960, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel, to Hon. Emanuel Celler) (proposing "for or because of any official act actually or purportedly performed by him" language).

Rep. No. 748, 87th Cong., 1st Sess. 8 (1961). Instead of prohibiting gifts provided for or because of the official's position, the final Subcommittee bill prohibited "payments to or receipts by public officials . . . 'for' or 'because of' an official act." *Id.* at 16 (to be codified at 18 U.S.C. § 201(f)). The Subcommittee had before it the Lindsay proposal and, while not "rejecting" it outright, nonetheless discarded that language in favor of the "for or because of any official act" language. The Subcommittee certainly knew how to prohibit all gifts for or because of the "employee's office or position," but chose the narrower statutory language instead.

Nor can it be argued that the Subcommittee did not recognize the difference. Senator Proxmire introduced S. 3306, which criminalized gifts to a public official who could benefit the donor through official action (the very conduct the Independent Counsel claims is proscribed by the gratuity statute). *See* S. 3306, 85th Cong. (1958). The staff report to the Subcommittee of the House Judiciary Committee explained that where the proposed gratuity language would prohibit a "reward for an official act," Senator Proxmire's proposed language "goes *further*, and would outlaw gifts to Government officials by interested parties, *irrespective of purpose or intent*." Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 72 & n.33 (Comm. Print 1958) (emphases added).

When H.R. 8140 was presented to the Senate, Senator Kenneth B. Keating expressed his view that, "[u]nder existing law the acceptance of a gift by a Federal employee may not be illegal even though the employee's

agency or department does regular business with the donor. This in my opinion is absurd and should be changed." S. Rep. No. 2213, 87th Cong., 2d Sess. 19 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3867 (individual views of Senator Keating). After acknowledging that "[o]bjections were raised at the hearings on H.R. 8140 to the scope of the amendment originally proposed with respect to gifts," Senator Keating proposed to replace the "for or because of any official act" language in H.R. 8140 with language that prohibited gifts for or because of the official's position:

> In order to avoid as much controversy as possible on this issue, . . . the amendment will be modified to reflect these objections. As modified, however, it would still prohibit any Government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person (a) is seeking to obtain contractual or other business or financial relationships with the employee's agency or (b) conducts operations or activities which are regulated by the employee's agency, or (c) has interests which may be substantially affected by the employee's performance or nonperformance of his official duties.

Id. Because this language would hold public officials strictly liable for soliciting or accepting certain gifts, Senator Keating's proposal was to be civilly, not criminally, enforced. *See, e.g., Conflicts of Interest: Hearing Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 25 (1962) (Letter dated July 23, 1962 from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm.) ("The section contains no criminal penalties.").

Nicholas deB. Katzenbach of the Department of Justice observed that Senator Keating's proposed amendment was superfluous in light of various administrative regulations. He concluded that "[i]n view of the steps taken by the administration to guard against the acceptance of improper gifts by Government employees, the proposed gifts section does not appear to be necessary." *Id.* at 25-26 (Letter dated July 23, 1962 from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm.). Significantly, this statement reflected the Department's view that administrative regulations already adequately addressed the conduct covered under Senator Keating's proposed amendment, thus obviating the need for Senator Keating's sweeping prohibitions.

After presenting his comments on the amendment to the Senate, Senator Keating withdrew his amendment for fear that "at this late date in the session attempts to amend the bill might be fatal to its passage." 107 Cong. Rec. 21986-87 (daily ed. Oct. 3, 1962). Although never debated by Congress, it is clear that Senator Keating's proposed amendment – which itself prescribed only civil penalties – never was incorporated into the gratuity statute. Accordingly, this legislative history falls far short from the Independent Counsel's suggestion that the gratuity statute as passed by Congress not only covered the violations reflected in Senator Keating's proposed amendment, but made them *criminally* enforceable.[17]

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[17] *See also* Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts III, IV and V,

C. The Supreme Court Authority Relied upon by the Independent Counsel Supports Sun-Diamond's Position.

1. Despite the Independent Counsel's assertions to the contrary, this Court in *United States v. Brewster*, 408 U.S. 501 (1972), confirmed that the gratuity statute requires some link between the gift and an official act.

Brewster held that the Speech or Debate Clause[18] did not immunize Senator Daniel B. Brewster from prosecution under either the bribery or gratuity statutes even though the alleged gifts were purportedly related to his performance of certain legislative acts. The Court reasoned that "no inquiry into legislative acts . . . is necessary for the Government to make out a prima facie case." *Id.* at 525.

Although not directly addressing the issue raised in this appeal, this Court – emphasizing that a key element to a gratuity violation is the relation of the gift to "an official act" – held that "[t]o sustain a conviction [under the predecessor gratuity statute] it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation *for an official act*." *Id.* at 527 (emphasis added). Justice White in his dissent also found that the predecessor gratuity statute "requires proof of a defendant's receipt, or an agreement or attempt to receive,

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35-70 (Comm. Print 1958) (analyzing then-current administrative regulations concerning gifts, and recommending a draft bill in the form of an amendment to the Administrative Procedure Act providing *civil* penalties for gifts given for or because of a public official's position).

[18] *See* U.S. Const. art. I, § 6.

anything of value 'for or because of any official act performed or to be performed by him. . . .' . . . *[W]hatever the act, the Government must identify it to prove its case.*" *Id.* at 553 (White, J., dissenting) (emphasis added).[19]

2. Similarly, the Independent Counsel's reliance on *Standefer v. United States*, 447 U.S. 10 (1980), is misplaced because (1) the Court in that case did *not* address the "for or because of any official act performed or to be performed" language in the gratuity statute; and (2) in any event, the instructions in *Standefer* support – rather than conflict with – the Court of Appeals' decision.

A jury convicted Standefer of violating the predecessor gratuity statute, 18 U.S.C. § 201(f), by providing free vacations to Niederberger, an Internal Revenue Service agent tasked with auditing the federal income tax returns of Standefer's employer, Gulf Oil Corporation ("Gulf"). The jury separately convicted Standefer of aiding and abetting Niederberger's unlawful acceptance of

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[19] The *Brewster* quotation relied upon by the Independent Counsel – "[t]he Government . . . need not prove any specific act . . . or decision to establish a violation of the statute" – is taken entirely out of its proper context. U.S. Brief at 27 (quoting *Brewster*, 408 U.S. at 528). The Court, in holding that the jury does not have to inquire into the specific legislative acts for which the alleged bribes to Senator Brewster were given, recognized that "evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury." 408 U.S. at 527. In other words, although the jury must find that Senator Brewster knew that the briber intended that the gifts influence, or at least were "for or because of," an official act, the jury would not have to find that Senator Brewster actually acted in accordance with the briber's wishes.

unauthorized compensation under 26 U.S.C. § 7214(a)(2)[20] and 18 U.S.C. § 2. After a divided panel affirmed the convictions, the Third Circuit decided to hear the case *in banc* to address whether Standefer could be found guilty of aiding and abetting Niederberger's § 7214(a)(2) violation notwithstanding Niederberger's acquittal of those charges. *See Standefer*, 447 U.S. at 13-14. When affirming the aiding and abetting conviction, the Third Circuit did not analyze the gratuity statute itself except to restate, in the "FACTS" section, the previous holdings. *United States v. Standefer*, 610 F.2d 1076, 1079-81 (3d Cir. 1979) (in banc).

The Independent Counsel rests his entire *Standefer* argument on part (c) of the second question presented in Standefer's Petition for Writ of Certiorari:

> 2. Does not the interpretation of the *aider and abetter statute* by the court below create a new substantive crime which Congress never intended by:
>
> * * *
>
> (c) *allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent*

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[20] This statute provides in pertinent part that:

> Any officer or employee of the United States acting in connection with any revenue law of the United States . . . (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty [commits a felony].

26 U.S.C. § 7214(a)(2).

> *where the jury after deliberation asked the court whether intent was to be considered in its deliberations.*

Standefer, Petition for Writ of Certiorari ("*Standefer* Pet.") at 3-4 (emphases added).[21] By its terms, the issue relates only to the aiding and abetting and unlawful compensation statutes; it has nothing to do with the gratuity statute. Standefer was *not* charged with aiding and abetting a gratuity violation. *See* 610 F.2d at 1079.

Even more telling is the fact that Standefer did not even cite to 18 U.S.C. § 201 as one of the "Federal Statutes and Federal Issues Involved." *Standefer* Pet. at 3. Nor did this Court take up or address this issue. Instead, the Court "granted certiorari in [*Standefer*] to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense."[22] *Standefer*, 447 U.S. at 11. The Independent Counsel's heavy reliance upon the two-sentence footnote in this Court's *Standefer* decision is thus plainly misplaced.

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[21] Page citations to this petition, Standefer's merits brief and the *Standefer* appendix are to the version of the cited document that is available through LEXIS. *See* U.S. Brief at 28 n.9.

[22] The Independent Counsel relies upon the fact that Standefer argued in his Supreme Court merits brief that the trial court "took away from the consideration of the jury the issue of corrupt intention." U.S. Brief at 29. But Sun-Diamond never contended, nor does it now contend, that the prosecutor must prove a "corrupt" intent to obtain a gratuity conviction as that is the requisite intent for bribery. *See* 18 U.S.C. § 201(b). Nor does the prosecutor have to prove a *quid pro quo* as in a bribery case. *See* U.S. Brief at 30.

Nevertheless, the Independent Counsel asserts that Question 2(c) somehow addresses the same issue that is raised here. *See* U.S. Brief at 29. But this cannot be the case. After the jury asked its question, the court instructed that the gift "has to be for the purpose of giving . . . things to the agent *on account of the audit* of these returns and his position with respect thereto." *See Standefer* Pet. at 68 (emphases added). Even assuming, *arguendo*, that Question 2(c) addresses the gratuity statute – and not the aiding and abetting and unlawful compensation statutes – Sun-Diamond *agrees* with this jury instruction. This is because the court instructed the jury to find that the gift was not only for or because of the official's position *but also* "on account of the audit" of the tax returns. Because an audit is an "official act," Standefer could not have complained that this instruction was in error.

At most, this Court upheld two instructions that addressed the requisite criminal intent under the aiding and abetting statute and § 7214(a)(2). The two instructions at issue were: (1) the government did not have to show that Standefer specifically intended to enter into an agreement with Niederberger to further an unlawful purpose; and (2) the jury could not consider the alleged facts that the audits conducted by Niederberger were correct and that Gulf actually paid more than $150 million in taxes as a result of those audits. *See, e.g.*, Brief for Petitioner at 16, 17, 19.

But even assuming, *arguendo*, that Standefer's arguments somehow concerned the gratuity statute, which they did not, Sun-Diamond is not arguing here that the Independent Counsel was required to show either an *agreement* between Espy and Sun-Diamond or that Espy

was influenced in any way as a result of the gifts. The Court of Appeals thus correctly found that *Standefer* has no bearing upon the issues in this case. *See* Pet. App. 11 n.5.

Finally, the *Standefer* district court instructions more closely parallel the Court of Appeals' than the Independent Counsel's interpretation of the gratuity statute. *See id.* The *Standefer* instructions make clear that the jury was required to find that the gifts (paid vacations) were related to *official acts* (favorable tax audits). The district court specifically instructed the jury that:

> It is sufficient if the defendant made these payments because of [a] desire to create a better atmosphere with Niederberger *with respect to the performance of the audit or appreciation for a speedy or favorable audit.*

Instructions at 16-17 (emphasis added). Payments for a "better atmosphere" were insufficient; instead, the district court required a nexus to a specific act. *See, e.g.*, Instructions at 15-20; *id.* at 28-29 (defendant's requested instructions Nos. 7 and 8); *id.* at 46-50; *see also* Pet. Opp. at 19 n.19 (quoting instructions). A thorough reading of these instructions finds none that permitted the jury to convict on the Independent Counsel's theory in this case that gifts by a regulated entity to a public official motivated solely by the official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or to reward official conduct.

To be certain, this Court's vague, two-sentence comment – whether or not *dictum* – did not intend to bless every word of the instructions. Even the Independent Counsel concedes that "the precise extent to which this

Court ruled on" the requisite intent under the gratuity statute "is unclear from the briefs on the merits and the Court's single footnote." U.S. Brief at 31.

II. The Gratuity Statute Proscribes Rewards for Past Official Action and Gifts to Increase the Likelihood of One or More Specific, Favorable Acts.

While this Court may not reach or define the outer boundaries of unlawful gratuities,[23] Sun-Diamond submits its views below to respond to the articulated views of both the Independent Counsel and the Department of Justice, respectively. *See generally* U.S. Brief at 17-32; DOJ Brief at 19-22.

The Court of Appeals correctly determined that "generalized sympathy" does not constitute an "act," and that the government, to convict under the statute, must prove that the donor intended either "to reward some past *concrete* official act[ion]" or "to increase the likelihood of one or more, *specific*, favorable acts." Pet. App. 7, 8 (emphases added).[24] With neither reference to nor analysis of the statute itself, the Department of Justice objects to the Court of Appeals' view that the gratuity statute

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[23] The discrete issue presented in this appeal is whether the District Court's instructions were erroneous, thereby precluding the jury from deciding the ultimate question of Sun-Diamond's intent underlying its gifts to Espy – whether the gifts were "for or because of any official act performed or to be performed."

[24] *See also* Pet. App. 8 (gratuity statute "carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act.*") (quoting *Brewster*, 506 F.2d at 82) (emphasis by Court of Appeals).

does not proscribe gifts for or because of "official goodwill." *See* DOJ Brief at 19-22. Analysis of the statute, however, confirms the accuracy of the Court of Appeals' understanding.[25]

1. When read as a whole, the plain statutory language prohibits only gifts given with the intent to reward or to influence some specific act or acts. A gift "for or because of any official act performed" prohibits rewards for "concrete" official conduct because *past* action cannot be hypothetical. The use of the verb auxiliary "to be" in modifying the past participle "performed" allows the statute also to cover specific, *future* official acts, *i.e.*, the forward-looking gratuity. To interpret the statute as prohibiting gifts for mere "generalized sympathy" without a connection to any specific act disregards the plain statutory language, which, through the connector "or," links both "performed" and "to be performed" with the term "official act." Put simply, a gift "for or because of any official *act* . . . to be performed" is something more than a gift to keep the official happy or for goodwill.[26] (Emphasis added.)

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[25] Sun-Diamond does not quibble with the notion that gifts for multiple official acts are proscribed by the gratuity statute, provided the acts are identifiable and the nexus established. *See* Pet. App. at 13-14; *cf. Jennings*, 160 F.3d at 1014 ("the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that' ").

[26] *See* Pet. App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities").

That Congress chose the verbal auxiliary "to be" – as opposed to using the term "may," "can," "might" or "could" – to cover forward-looking gratuities is also significant. "To be" is defined to mean "become supposed" or "become destined," and "express[es] futurity, arrangement in advance, or obligation." *Webster's Third New International Dictionary* 189 (1993).[27] Thus, an act "to be performed" is one that will, with some degree of certainty, come to fruition. In fact, interpreting this statute as prohibiting gifts for acts that may, can, might or could be performed ignores the entire phrase "performed or to be performed" by prohibiting *all* gifts "for or because of any official act" rather than *only* gifts "for or because of any official act *performed or to be performed*." (Emphasis added); *see, e.g., Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Congress, which added the phrase "performed or to be performed" as words of limitation, intended to exclude from the contours of the statute those instances where there is a mere *chance* that, at some undisclosed

[27] Title 18 of the United States Code contains several provisions using the phrase "to be performed." In each case, the phrase in context necessarily implies that some specific act will be performed. *See, e.g.*, 18 U.S.C. §§ 116, 372, 1020, 4045; *see also* Fed. R. Crim. P. 25(b) ("If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties *to be performed* by the court after a verdict or finding of guilt. . . . ") (emphasis added); *cf. United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) (interpreting phrase "an act to be done" in 18 U.S.C. § 2(b) (aiding and abetting) as meaning, *inter alia*, "that defendant have the specific intent of 'bringing about' the forbidden act").

time in the future, the official may be able to benefit the donor somehow.

2. The Department of Justice nonetheless argues, without support, that the phrase "for . . . any official act . . . to be performed" can mean "for official goodwill":

> Where a federal official has a continuing capacity to act on matters that will affect a particular entity, the regulated party has an obvious interest in keeping the public official favorably disposed as a general matter, regardless of the outcome of any particular decision. *The generation and maintenance of such official goodwill falls within the statute*, for ultimately a favorable attitude may be manifested in specific official acts.

DOJ Brief at 20 (emphasis added).[28] For the reasons discussed above, this "X = Y" argument is hardly more persuasive than the one pressed by the Independent Counsel. *See* discussion, *supra*, at Section I.

If the statute means what it says, then the donor *must* have had a particular act (or acts) in mind when presenting the gift to the public official, and the factfinder may not be instructed to find that the gift was for or because of an official act simply because the recipient was in a position to act in a manner affecting the donor. The prosecutor should have to prove every element of the offense, including proof beyond a reasonable doubt that the donor gave the gift for or because of an "official act"

[28] *Compare* Pet. App. 9 ("we have refused to allow the official act requirement to be satisfied by some vague hope of inducing warm feelings toward the donor") *with* U.S. Brief at 22 (the gratuity statute "reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interest").

either "performed or to be performed." *See, e.g., Jennings*, 160 F.3d at 1021 n.5 ("Clearly, goodwill gifts are neither bribes nor gratuities, since they are made neither with the intent to engage in a 'relatively specific quid pro quo' with an official nor 'for or because of' a specific official act (or omission)."); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (the gratuity must have been "made because of a specifically identified act").

Nor does the hypothetical posited by the Department of Justice accurately illustrate its position. That hypothetical read as follows:

> [I]f an organized crime figure furnishes gifts to a United States Attorney, hoping that the United States Attorney will decline prosecution (or prosecute less vigorously) in the event that the donor or one of his subordinates comes to the attention of law enforcement authorities, the gifts would be made "for or because of" (potential) official action.

DOJ Brief at 20-21. This may in fact be an example of bribery if the jury finds that the "organized crime figure" intended to elicit a *quid pro quo* by giving things of value for the direct purpose of influencing the U.S. Attorney to offer lenient prosecutorial treatment in the future. Such conduct may also constitute a gratuity because lenient prosecutorial treatment *is* most assuredly "specific action," and, under the hypothetical facts, there may well be a high degree of certainty that the U.S. Attorney will be in a position to take the contemplated action.

In contrast, there are real-life, every day examples of conduct that would inadvertently be criminalized under the "gift for official goodwill" reading of the gratuity statute adopted by the Department of Justice. Judges, lawmakers and other public servants live in a world

surrounded by people – people with whom they have personal relationships – who themselves believe that maintenance of the relationship could confer some benefit upon them at some unknown time. Public servants do not live, nor do we want them to live, in total isolation. Consequently, friends, relatives, neighbors and acquaintances engage, go out with, and bestow goodwill gifts upon them, just as friends, family members, neighbors and acquaintances are prone to do. But who is to say that the giving of such gifts (even in a reciprocated relationship) is purely out of friendship or, alternatively, *primarily* friendship while containing *some* small element of hope or expectation that the giving of the gift and the cultivation or maintenance of the friendship might someday inure to the donor's benefit:

> A lawyer has taken a lawyer-friend to baseball games for years. Now that the friend has become a judge, do the baseball games become an unlawful gratuity, because the donor understands that maintenance of the friendship and the judge's goodwill *might* somehow inure to his advantage? Does it matter if he has no case pending before the judge but might someday have a case before him? *See* Pet. App. 10-11 & n.4.
>
> A shopkeeper, a former police officer, is friends with federal law enforcement agents. Now that one of these friends lives in the neighborhood where his store is located, do the gifts of friendship now constitute a felonious act because maintenance of the relationship might, in the donor's mind, somehow lead to more police protection?

> And to recast the hypothetical offered by the Department of Justice: A law-abiding citizen seeks to maintain a long-held friendship with the newly-appointed U.S. Attorney, believing in some small part that generation of some good-will on the part of the U.S. Attorney toward the citizen might somehow result in beneficial, but unspecific, assistance sometime in the future.

Under the Department of Justice's standard, these citizens could be charged with a felony that carries up to a two-year jail term. But the gifts are so remotely linked to "any official act . . . to be performed" that to render the gift an unlawful gratuity essentially rewrites the statute to say "for or because of any generalized feelings of goodwill toward the donor that might, at some undisclosed time in the future, manifest itself in the form of some purely hypothetical official act." The Department of Justice provides no support for a statutory interpretation that yields such anomalous results. Instead, Congress' employment of the "performed or to be performed" language saves the statute from swallowing up and criminalizing such a broad array of conduct.[29]

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[29] Several circuit courts give a symmetrical reading to the "performed or to be performed" language by interpreting more strictly the gratuity statute as prohibiting only backward-looking and forward-looking *rewards* for official action, leaving the bribery statute to cover instances where the donor acts with a corrupt intent *to influence* one or more official acts. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("illegal gratuities, which typically follow the act for which they are paid, may be conveyed before the occurrence of the act (so long as the payor believes the official has already committed himself to the action)") (citations omitted); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (approving gratuity jury instruction requiring prosecutor to "prove, beyond a reasonable

3. This is not to say, however, that gifts given otherwise than as provided by law to public officials go unpunished. In fact, gifts for or because of an official's

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doubt, that the defendant intended to reward [the public official] for past action or action [the official] was already committed to take"); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as a reward for actions the public official has already taken or is already committed to take"); *see also United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978); *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965).

In fact, Congress used the phrase "to influence" in the bribery statute, but omitted that phrase from the gratuity statute, using the phrase "for or because of" instead. *Compare* 18 U.S.C. § 201(b) *with id.* § 201(c)(1)(A). And when Congress intended to prohibit the giving or acceptance of gifts motivated by *either* a desire to reward *or* to influence, it has specifically so provided. *See* 18 U.S.C. § 1954 (analogous gratuity statute prohibiting certain persons associated with employee benefit plans from receiving or agreeing to receive gifts "*because of or with intent to be influenced with respect to*," certain "actions, decisions, or other duties") (emphasis added).

The pertinent legislative history likewise suggests that payments "for" official action means that the donor intends to reward, *but not to influence*, official conduct. *See* Staff of Subcomm. No. 5 of the House Comm. of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcomm. No. 5 of the Comm. of the Judiciary, House of Representatives, Parts I and II, 72 (Comm. Print 1958). Finally, the view that forward-looking gratuities prohibit only rewards is supported by the fact that the phrase "or to be performed" was added only as a "very *minor* suggestion[ ], perhaps hardly worth mentioning[.]" *Id.* at 87-88 (Statement of J.H. Macomber, Jr.) (emphasis added).

position are presently prohibited by administrative regulations and Congressional Rules. *See, e.g.*, 5 U.S.C. § 7353; 5 C.F.R. 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); Rule XXXV of the Standing Rules of the Senate (amended July 18, 1995); Rule XXVI of the Rules of the House of Representatives (amended January 6, 1999); *see also* 9 C.F.R. § 203.2 (Department of Agriculture regulation concerning gifts from packers of meat to government employees). Moreover, debarment and other administrative sanctions act to deter government officials and regulated parties from running afoul of ethics policies concerning government officials. And, as noted above, the very existence of these administrative regulations prompted the Department of Justice, at the time Congress was considering different versions of the competing gratuity bills, to conclude that the more sweeping prohibition contained in the Keating Amendment was unnecessary. *See* discussion, *supra*, at 29.

4. Even assuming that the gratuity statute *could* permissibly be read, as the Independent Counsel and the Department of Justice have apparently read it, to prohibit gifts merely for official goodwill, then this Court should apply the rule of lenity to give the statute the more strict interpretation adopted by the Court of Appeals. The rule of lenity doctrine provides that a court should strictly construe penal laws in favor of the accused out of deference to the legislative branch and to provide fair warning to the public:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress . . . and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed[.]"

United States v. Aguilar, 515 U.S. 593, 600 (1995); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *cf. United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., dissenting) ("In my view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.").

5. Finally, to the extent that the Independent Counsel or the Department of Justice believes that the actual terms of the gratuity statute provide for a standard that is too lenient – or that their statutory interpretations further valid policy objectives – this is an issue for Congress, not for this Court.[30]

III. The District Court's Error Was Far From Harmless.

Before addressing the Independent Counsel's harmless error argument on the merits, it is important to clarify some procedural points. First, the Independent Counsel never sought review by this Court on the issue of harmless error, nor did this Court ever grant such review. Second, the Independent Counsel never raised or

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[30] *See, e.g., Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 811-12 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread."); *United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) (Souter, J., dissenting) ("If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.").

otherwise preserved this issue below. And, with the exception of a swift recognition that the District Court's "error cannot be called technical or harmless," the Court of Appeals never reached the harmless error issue. Pet. App. 13. Accordingly, the Independent Counsel has waived this argument. At most, this Court should remand the issue to the Court of Appeals.[31] As reflected below, however, even a remand is not necessary as the District Court's error cannot be deemed harmless.

The Independent Counsel argues:

> By returning a guilty verdict, the jury necessarily rejected respondent's theory of defense and found beyond a reasonable doubt that the gifts were motivated by the fact that the Secretary of Agriculture exercised regulatory authority over respondent's business. That finding was 'functionally equivalent' to finding that respondent gave the gifts for or because of Espy's official acts."

U.S. Brief at 44 (citation omitted). But even if the jury rejected Sun-Diamond's defense that the gifts were not given entirely out of friendship, that is not the same as finding that they were given "for or because of an official act." All that can be deduced from the verdict is that the jury found either that Sun-Diamond's gifts were motivated (at least in part) because of Espy's official position, or alternatively, that the gifts were given "while [Sun-Diamond] had issues before the" USDA. Pet. App. 88.[32]

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[31] *See, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986).

[32] *See, e.g.*, Pet. App. 87 ("The government need not prove that the alleged gratuity was linked to a specific or identifiable official act *or any act at all.*") (emphasis added); *id.* at 88 ("the government has to prove that Sun-Diamond Growers of

Neither is sufficient under the statute to convict. Conversely, the Independent Counsel did *not* have to prove – and the jury did *not* find – that Sun-Diamond intended to give a thing of value to Espy "for or because of an[ ] official act." By taking this issue away from the jury, the District Court violated the company's constitutional rights under both the Fifth and Sixth Amendments:

> What the fact-finder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements[.] . . . It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.

Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) (citations omitted).

Sun-Diamond was seriously prejudiced as a result of these constitutional violations. As discussed earlier, Busboom, Sun-Diamond's former President, testified that the purposes of the company's gifts to Espy were: (1) to foster Douglas' information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas' status in the agricultural and lobbying communities by being seen with a Cabinet Secretary. *See* discussion, *supra*, at 16-17. He also testified that the gifts were not to "purchase . . .

California gave knowingly and willingly Secretary Espy things of value while it had issues before the" USDA).

favor" or "influence." C.A.J.A. at 223. Busboom's testimony, while perhaps tending to support a finding that the gifts were for or because of Espy's *position*, also supports a finding that the gifts were *not* for or because of any official *act*. In light of the erroneous instructions, the Independent Counsel's representative at trial relied heavily upon this very testimony in closing argument, contending that Sun-Diamond violated the gratuity statute precisely because (and *only* because) the gifts had a business purpose.[33] Invoking the imprimatur of the court, the Independent Counsel argued that these gifts, although unrelated to official acts, "clearly fall[ ] exactly within the instructions that the Court gave about what is an illegal gratuity." Trans. at 901.

Not only did the District Court take from the jury the ultimate issue of Sun-Diamond's intent, but the Independent Counsel actually used what should have been *exculpatory* evidence to *convict* the company. A properly instructed jury might have acquitted Sun-Diamond of the gratuity charges by concluding that, in light of Busboom's testimony, the company's gifts to Espy were *not* "for or because of any official act," even if given with a business purpose. But one can only guess as to whether the jury, if properly instructed, would have reached this conclusion because the *only* defense allowed to be presented to the jury was that Sun-Diamond acted out of pure friendship.

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[33] *See, e.g.*, Trans. at 899-903, 906; *see also* C.A.J.A., Tab 3 at 964-68, 972-74; C.A. Opp. Brief at 4-7 ("A key component of Richard Douglas' position 'was to maintain relations with key decision-makers at the Department of Agriculture and other agencies in Washington.' ") (citation omitted).

Accordingly, the Independent Counsel's argument that the jury rejected Sun-Diamond's "friendship" defense is not the issue. Rather, the real question is whether the Court can find that the District Court's irrebuttable presumption of unlawful intent – which entirely precluded the jury from considering Sun-Diamond's other (perhaps even stronger) defense that its gifts were unrelated to any official acts – "played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281.

This Court cannot say that "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 583 (1986) (citation omitted). This case is thus distinguishable from *Rose* – a habeas corpus case relied upon by the Independent Counsel – which held that "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579.[34] Sun-Diamond therefore submits that the District Court's virtual presumption of guilt cannot possibly be deemed harmless error when, in this country, defendants must be *proven* guilty beyond a reasonable doubt, and they are presumed *innocent* until such time.

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[34] *Cf. Sullivan*, 508 U.S. at 277 ("although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence").

CONCLUSION

For the foregoing reasons, Sun-Diamond respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

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v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Section 201(c)(1)(A)'s Requirement That A Thing of Value Be Given "For or Because of Any Official Act" May Be Satisfied By A Showing That The Thing Of Value Was Motivated By The Recipient's Official Position 1

A. Neither The Plain Language Of The Gratuities Statute Nor The Existence Of Broad Administrative Gift Regulations Supports Respondent's Position 2

B. The Legislative History Relied Upon By Respondent Is Of No Value In Determining The Breadth Of Section 201(c) 12

C. The Broad Language Of The Gratuities Statute Protects The Public From A Division Of Loyalties By Its Officials 13

II. Even Assuming Error In The Jury Instructions, Any Such Error Was Harmless 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases: **Page[s]**

Bifulco v. United States, 447 U.S. 381 (1980) 12

Buckley v. Valeo, 424 U.S. 1 (1976) 7

Crandon v. United States, 494 U.S. 152 (1990) 14-15

Dixson v. United States, 465 U.S. 482 (1984) 4

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 15

Moskal v. United States, 498 U.S. 103 (1990) 11-12

Perrin v. United States, 444 U.S. 37 (1979) 13-14

Russello v. United States, 464 U.S. 16 (1983) 3

United States v. Birdsall, 233 U.S. 223 (1914) 4

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 8

United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) 13

United States v. Evans, 572 F.2d 455 (5th Cir. 1978) 13

United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) 13

United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985) 10

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) 13

United States v. McDade, 827 F.Supp. 1153 (E.D. Pa. 1993) 10

United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (*en banc*), *aff'd* 447, U.S. 10 (1980) 14

TABLE OF AUTHORITIES

Cases: **Page[s]**

United States v. Williams, 504 U.S. 36 (1992) 15

United States v. Williams, 29 F.Supp.2d 1 (D.D.C. 1998) 6

Statutes:

5 U.S.C. § 7353 11

5 U.S.C. § 7353(b) 10

18 U.S.C. § 201(a)(3) 4, 5, 6

18 U.S.C. § 201(c)(1)(A) ..... *passim*

18 U.S.C. § 203 14

18 U.S.C. § 209 14

20 Edwardi, III. c.1 (1346) *reprinted in* STATUTES OF THE REALM, Vol. 1 (William S. Hein & Co., Inc. 1993) 13

Federal Regulations:

5 C.F.R. § 2635.101 *et seq.* 10

5 C.F.R. § 2635.202 10

Other Sources:

Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 11

House Rep. No. 748 (87th Cong., 1st Sess., July 20, 1961) 4

BIPARTISAN TASK FORCE ON ETHICS, 101st CONG., REPORT ON H.R. 3660 (Comm. Print 1989) 10, 11

135 CONG. REC. H8758 (1989) 11

Page[s]

Henry III: The Provisions of Oxford (1258), *reprinted in* Stephenson, C. and Marcham, F.G. (eds.), SOURCES OF ENGLISH CONSTITUTION HISTORY, Vol. 1, (Harper and Rowe, rev. ed. 1972) 13

4 W. BLACKSTONE, COMMENTARIES (1765) 14

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REPLY BRIEF OF THE UNITED STATES

I. Section 201(c)(1)(A)'s Requirement That A Thing of Value Be Given "For or Because of Any Official Act" May Be Satisfied By A Showing That The Thing Of Value Was Motivated By The Recipient's Official Position

In its opening brief, the Government demonstrated that 18 U.S.C. § 201(c)(1)(A)'s requirement that a thing of value be given "for or because of any official act" can be satisfied by a showing that the giving was motivated by the recipient's official position, where "official position" is understood to mean being in a position to take official action affecting the donor. To hold otherwise would write forward-looking gratuities out of the statute and effectively erase the line between bribes and gratuities. Rather than directly addressing the Government's position, respondent and the *amici* supporting it argue the simplistic position that "official position" and "official acts" are not the same thing.

Instead of answering the question the Court posed, respondent and its supporters ask the Court to rewrite the

statute. In place of gifts given "for or because of any official act," they want the statute limited to prohibiting gifts given "to influence a specific official act." Such a restriction on the statute would not only defy its plain language but also undermine the enforcement scheme that Congress crafted.

A. Neither The Plain Language Of The Gratuities Statute Nor The Existence Of Broad Administrative Gift Regulations Supports Respondent's Position

1. A glaring irony pervades the briefs of respondent, the American League of Lobbyists (ALL), and the National Association of Criminal Defense Lawyers (NACDL). Although all three argue strongly for a "plain meaning" interpretation of 18 U.S.C. § 201(c)(1)(A), they urge this Court to write into the statute restrictions that Congress did not include.

Congress forbade the giving of gratuities "for or because of *any* official act," and then defined "official act" in the broadest possible terms. Respondent, ALL, and NACDL, however, ask this Court to limit the statute's reach to gifts given "for or because of a *specific* official act."

Thus, respondent baldly asserts that "the unlawful gratuity is a reward for either an act 'performed' or a gift to make some *specific* future conduct more likely." Respondent's Brief at p. 23 (emphasis added). NACDL likewise rewrites the statute to conclude that "section 201(c)(1)(A) criminalizes only gifts motivated by a *specifically identified* official act." NACDL Brief at p. 18 (emphasis added). ALL goes even further, suggesting that "[g]ratuities not motivated by a '*specific* official action performed or to be performed' – ones that are not inevitably nefarious – do not merit criminal sanctions and may even be beneficial." ALL Brief at p. 4 (emphasis added).

Respondent and its supporters endorse a "specific act" requirement because it helps to blur the distinction between gratuities and bribes, a line already seriously eroded by the D.C. Circuit's decision. In reality, respondent, ALL, and

NACDL are exploiting the inconsistencies pervading the decision below. The court of appeals rejected the argument that "the jury should have been required to find that the gratuities were conferred with specific knowledge of a definite official action for which compensation was intended," because "leniency in a multitude of specific acts was enough." App. 13 (internal quotation marks omitted). However, it simultaneously found the statute to forbid only gratuities that "reward some past *concrete* official act or acts," or, looking to the future, "where the giver is motivated simply by the desire to increase the likelihood of one or more *specific*, favorable acts." App. 7-8 (emphasis added).

Respondent and its supporters go even further in attempting to blur the distinction between gratuities and bribes. Section 201 differentiates between the two by prohibiting as a gratuity anything of value given to a public official "*for or because of* any official act," and prohibiting as a bribe anything of value given to a public official "*with intent to influence* any official act." Where Congress uses particular language in one section of a statute but not another, the usual presumption is that it acted intentionally and purposely. *Russello v. United States*, 464 U.S. 16, 22-23 (1983). Nevertheless, respondent and the *amici* would have this Court erase this distinction.

Thus, respondent insists that "the plain statutory language [for the gratuity offense] prohibits only gifts given *with the intent to reward or to influence* some specific act or acts," and that the gratuity statute proscribes gifts "*to increase the likelihood* of one or more specific, favorable acts." Respondent's Brief at pp. 37, 36 (emphasis added). Similarly, ALL asserts that "in order to have committed a crime [under section 201(c)], the defendant must have acted *with the specific intent to influence* or reward some 'official act.'" ALL Brief at pp. 7-8 (emphasis added).[1]

---

[1] NACDL and ALL would further limit the scope of section 201(c) to gifts given with "corrupt intent," an explicit requirement of the bribery

However, in outlawing gratuities to public officials, Congress forbade private individuals from giving gifts motivated by official action, regardless of the specificity with which those acts could be identified, and regardless of whether an intent to influence or any other corrupt intent could be shown. Instead of using the wording urged by respondent, Congress wrote exceedingly broad language that denotes a non-causal connection between the gift and actual or potential matters coming before the official – "for or because of" anything "which may at any time be pending, or which may by law be brought before any public official ... "[2] 18 U.S.C. §§ 201(c)(1)(A), 201(a)(3); *cf. Dixson v. United States*, 465 U.S. 482, 491-92 (1984) (Congress drafted §201 with "broad jurisdictional language" having "wide application"). The latter phrase is the precise language to which this Court gave an expansive interpretation in *United States v. Birdsall*, 233 U.S. 223 (1914), which neither respondent, ALL, nor NACDL even mention. *See* Brief of United States at pp. 20-21.

The facts of the present case well illustrate how respondent's recasting would undermine the statute Congress wrote. Sun-Diamond was a large agricultural cooperative, App. 1-2, and the Department of Agriculture's actions profoundly affected its business in a variety of matters. *See, e.g.*, Gov't.Exh. 480, Joint Appendix filed in Court of Appeals, ("C.A.J.A.") Tab 39 and Tab 3, pp. 380-81. From the outset of Secretary of Agriculture Espy's tenure, it was apparent that official actions he would take in the performance of official duties would affect Sun-Diamond. The indictment alleged and the Government proved, *inter alia*, two such actions – regulatory definitions under the market promotion program, and regulatory input concerning methyl bromide – which involved millions of dollars of potential benefits to Sun-Diamond. *Id.*; Gov't.Exh. 292, C.A.J.A. Tab 34 and Tab 3, p. 168; App. 3-4. But under the

statute not found in the gratuity statute. *See* NACDL Brief at p. 23; ALL Brief at p. 3.

[2] *See* House Rep. No. 748 (87th Cong., 1st Sess., July 20, 1961) at 15 ("'Official Act' means any decision or action pending before or which may come before a public official.")

terms of the statute Congress wrote, it does not matter whether the gratuities were given for or because of these particular official acts, or instead for or because of the myriad official acts affecting Sun-Diamond that the Secretary would inevitably take during his tenure, many of which could not be identified with any specificity at the time the gifts were given. If Sun-Diamond gave gifts to Secretary Espy because he was in a position to help it through his official acts, then it gave gifts "for or because of *any* official act," regardless of whether it gave gifts "*with intent to influence* or reward a *specific* official act."

2. The foregoing explains why the Government answered the Question Presented, as this Court phrased it,[3] with a qualified "Yes." Where, as here, the donor gives gifts because the recipient is in a position to perform official acts to its benefit, then the gifts were given "for or because of any official act." Indeed, the statutory definition of "official act" includes anything "which may by law be brought before any public official, *in such official's official capacity*, or *in such official's place of trust or profit.*" 18 U.S.C. § 201(a)(3). If, on the other hand, the donor gives gifts merely to celebrate the recipient's status, or to honor the recipient, or purely out of friendship, then the gift is not "for or because of any official act," and not within the prohibition of the statute.

Respondent, ALL, and NACDL, however, ignore this distinction, pretending that the Government does not differentiate between "official position" and "official acts." Through this device, they try to reduce the Government's position to a quibble over semantics, characterizing it as an assertion that "X = Y." Respondent's Brief at p. 12. Respondent argues further that one cannot substitute the phrase "official position" for "official act" in the bribery statute. Respondent's Brief at p. 15. But, of course, the Government does not try to equate "position" with "act," or to substitute one

[3] "Is the requirement in 18 U.S.C. Sec. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?"

word for the other. Rather, it has responded to the Court's question with the answer that in some circumstances the official act required by the statute can be shown by reference to the recipient's official position, and in some circumstances – because of the giver's lawful motives – it cannot.

Respondent and its supporters never address the question presented. They argue the tautology that "official position" is not the same thing as "official acts," but they do not state whether, and under what circumstances, the requirement that the gratuity be given "for or because of any official act" can be *satisfied* by a showing that the giving was motivated by the recipient's position.

If a conviction under section 201(c)(1)(A) cannot in the future be maintained where a private person gives a public official gifts for or because of general, but not specific, official acts, then the statute would be a dead letter in the control of corruption. Absent an explicit *quid pro quo*, which would turn a gratuity into a bribe, every defendant will seek refuge in a claim that gifts were given for the purpose of building "generalized sympathy."[4] The fact that such "generalized sympathy" is of value to the donor only because the official is in a position to take acts in the future to the donor's benefit – i.e., that matters of interest to the donor "may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3) – is of no moment under the decision below, or in the result urged by respondent and its supporters.

3. Ultimately, respondent, ALL, and NACDL fail to give credence to the breadth of the statutory definition of "official act." The most blatant example of this strategy is

[4] Indeed, as the United States' Opening Brief noted at p. 42, at least one district court has applied the D.C. Circuit's decision to overturn a jury verdict against a lobbyist for a major agricultural concern who gave gratuities to the Secretary of Agriculture despite the concession that the gifts were given "to win generalized sympathy," because the particular acts for which the gratuities were given were too inchoate at the time of giving. *United States v. Williams*, 29 F. Supp.2d 1, 6-7 (D.D.C. 1998).

respondent's suggestion that gifts from a lobbyist to a public official may be motivated not by official action but by the lobbyist's effort to gather intelligence. Respondent's Brief at p. 18.[5] What this assertion ignores is that, to the extent a lobbyist is using gratuities to induce the recipient to meet with him or dispense helpful information, he is buying "official acts" within the broad statutory definition. Lobbyists, like anyone else, have a right to seek information from the government, but on the face of the statute, Congress was no more tolerant of private individuals giving gifts in recognition of preferential access to information than it was of the giving of gratuities for or because of any other form of official action. The statute does not tolerate the use of private wealth to pay for public acts.[6]

4. A practice common to respondent, ALL, and NACDL is to illustrate the supposed need to rewrite the statute through extreme hypotheticals. Respondent's Brief at pp. 20, 41-42; ALL Brief at pp. 10-11, 13; NACDL Brief at p. 22. The general pattern is to posit a trivial gift (brownies or a hand-knit sweater) from an apparently naive donor (a senior citizen or a high school student), and then to use the apparent unfairness of prosecuting the "offense" as a springboard for arguing for the insertion of a specificity requirement into the statute. A variation is to conjure up an old friend continuing

[5] ALL, in contrast, appears to acknowledge that a lobbyist's role is "to seek to influence government." ALL Brief at p. 2.

[6] On the other hand, strict application of section 201(c)(1)(A) would not implicate any First Amendment concerns. *See* ALL Brief at pp. 21-27. ALL grudgingly concedes that "gift-giving per se may not be constitutionally protected . . . . " *Id.* at 25. Undoubtedly, private individuals have a "right to seek to influence government," ALL Brief at p. 2, but that is a right to persuade an official, not to purchase his sympathy. Nor would the correct application of the statute prohibit or discriminate against speech on the basis of content. *Cf. Buckley v. Valeo*, 424 U.S. 1, 30-33 (1976) (statutory spending limits on campaign contributions to candidates do not discriminate against speech based upon content but instead impose evenhanded and equal restrictions). While the statute restricts the opportunities of a lobbyist (or anyone else) to buy access to government officials, it does not foreclose access to anyone.

the practice of hosting a government official. Of course, respondent and its supporters resort so frequently to extreme hypotheticals because they cannot find a reported case in which "ordinary citizens" actually ran afoul of the statute, notwithstanding the broad interpretation it has received for over thirty years.

The hypotheticals do not advance respondent's position because the apparent unfairness of prosecution upon which they are premised springs from the peculiar factual circumstances assumed, rather than from the reason for the gift, which is generally not identified. Under the Government's view of the law, a senior citizen giving a small gift to a public official because he is in a position to take action in her favor would violate the law; under respondent, ALL, and NACDL's view of the law, a senior citizen giving a small gift to an elected official to influence in any way a stand he might take on a specific issue (like Social Security) would violate the law. Neither would be a sensible violation to prosecute, because it is *de minimis*, and prosecutorial discretion would ordinarily dictate that the case not be pursued. However, the critical point is that the potential for the prosecution of picayune gratuities flows from the fact that the statute has no stated minimum, and this potential will remain even if this Court accepts respondent's invitation to write new limitations into the statute.[7]

This case, of course, is not about sweaters or brownies donated by starry-eyed constituents. It is about a major agricultural cooperative, that stood to benefit from millions of dollars in discretionary federal spending, giving nearly $6000 in gifts to its chief governmental regulator, the Secretary of Agriculture. And, in the view of the briefs supporting

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[7] In a few of the hypotheticals, the recipient of the gratuity is an elected official. Things of value provided to elected officials, at least when they can be characterized as campaign contributions, can implicate special concerns that are not present in the instant case. The D.C. Circuit recognized this distinction in *United States v. Brewster*, 506 F.2d 62, 78, 81-82 (D.C. Cir. 1974), but abandoned it in the decision below. App. 8-9.

respondent, it would have made no difference if that cooperative had given the Secretary a million dollars in cash. Under respondent's interpretation of section 201(c)(1)(A), so long as the donor can claim that it gave the gift for generalized goodwill (i.e., the hope of yet unidentified favorable acts in the future), rather than for a specifically identifiable act, the donor can shower gifts on the official without limit, and the official can pocket them without any consequences (other than civil administrative actions).

The fact that almost none of these hypotheticals specify why the gift was given renders them useless to analyze the problem at hand. In almost every one of the few instances in which the reason for the gift *is* specified, the result would be the same regardless of whether the courts applied the standard proposed by the Government (satisfying the official act requirement with a showing that the giving was motivated by the official's being in a position to take action affecting the donor) or respondent's position (limiting the statute to situations where the donor attempts to influence a specific official act.)

The one exception, appearing at page 42 of the respondent's Brief, is a recasting of the hypothetical appearing at pages 20 to 21 of the Department of Justice's Brief. In respondent's version, an otherwise law-abiding citizen gives a United States Attorney gifts in hopes of obtaining unspecific beneficial assistance in the future. In other words, the gift is given because the official is in a position to take official action that affects the donor, but is not given to influence a specific act. Thus, the gifts are unlawful gratuities under the Government's view of the statute, but lawful under respondent's. The problem with respondent's interpretation is well illustrated by the Department of Justice's original version of this hypothetical, which posited the donor as an organized crime figure but otherwise assumed the same facts. Since liability under the statute must turn on the reason the gift was given, rather than the overall probity of the giver, respondent's version of the law necessarily endorses organized crime figures buying generalized favor from law enforcement officials.

5. The administrative regulations (5 C.F.R. § 2635.101 *et seq.*) to which respondent, ALL, and NACDL repeatedly compare the statute are not a substitute for section 201(c)(1)(A). Congress's creation of an administrative regimen to govern a class of offenses does not impliedly repeal a pre-existing criminal statute covering the same type of activity. *United States v. Hansen*, 772 F.2d 940, 944-48 (D.C. Cir. 1985) (Scalia, J.).

The briefs in support of respondent make much of the fact that the regulations contain numerous safe harbors (such as exclusions for gifts with value below $20, and for refreshments at speaking engagements) that the statute does not. But the briefs fail to note that these safe harbors are, in general, incorporated into the enforcement of section 201. Section 201(c)(1) forbids gratuities given "otherwise than as provided by law for the proper discharge of official duty . . . ." The Ethics Reform Act of 1989, the wellspring of the administrative regulations on which respondent and its supporters rely, explicitly permits the receipt of a gift that is allowed under the administrative regulations, so long as the gift is not accepted for being influenced in the performance of any official act. 5 U.S.C. § 7353(b). The safe harbors in the administrative regulations thereby create corresponding safe harbors in section 201(c). *See United States v. McDade*, 827 F.Supp. 1153, 1173 (E.D. Pa. 1993); 5 C.F.R. § 2635.202 (1992) ("Unless accepted [in return for being influenced in the performance of official acts], a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)."); BIPARTISAN TASK FORCE ON ETHICS, 101st CONG., REPORT ON H.R. 3660 ("Ethics Report"), at 12 (Comm. Print 1989) ("This statutory authority would bar any possible prosecution under the illegal gratuities statute for acceptance of a gift of minimal value that may bear some relation to official

action."); 135 CONG. REC. H8758 (1989) (statements of Rep. McCollum and Rep. Fazio).[8]

In any event, to whatever extent the regulations might recognize safe harbors that the statute does not, rewriting the statute's intent requirement would not alter the result. A small gift given with the requisite intent will trigger the statute, despite its seeming triviality, regardless of whether the requirement is the statutory "*for or because of any* official act" or respondent's proposed rewrite of "*with intent to influence a specific* official act." Even if Congress did give the statute a broader sweep than the regulations, this is a concern to be addressed by Congress, not this Court.

The administrative regulations and 5 U.S.C. §7353 are important adjuncts to the gratuities statute, but they are not a substitute for it. For one thing, they govern only the recipient official, not the donor; they would not have touched respondent. Additionally, they impose broad strict liability for the acceptance of gifts from certain persons, irrespective of the motivation behind those gifts. Most importantly, the regulations do not, and cannot, carry out what Congress saw as an important policy of attaching criminal, and not just civil, consequences to activities that can compromise governmental processes.

6. In the end, respondent is left seeking refuge in the rule of lenity. Respondent's Brief at pp. 44-45. But this rule is only applicable if the Court is left with an ambiguous statute after exhausting all sources of interpretive aid. *Moskal v. United States*, 498 U.S. 103, 108 (1990). It does not apply "merely because it [is] possible to articulate a construction [of

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[8] While crafting the Ethics Reform Act, Congress recognized that section 201(c) applied to de minimis gifts and that the Department of Justice had taken the "expansive view that gifts of appreciation or goodwill may be subject to prosecution under [section 201(c)]." Ethics Report at 8. Yet, while Congress chose to create a safe harbor for de minimis gifts, it left goodwill gifts of more than nominal value within the broad reach of section 201(c). *See id.* at 12; Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

the statute] more narrow than that urged by the government." *Id.* To hold otherwise would allow every defendant challenging a statute's interpretation to invoke the rule. Because a reasonable doubt as to the statute's intended scope does not endure a review of "'the language and structure, legislative history, and motivating policies' of the statute," the rule of lenity is unavailable to respondent. *Id.* (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

B. The Legislative History Relied Upon By Respondent Is Of No Value In Determining The Breadth Of Section 201(c)

While purporting to agree that legislative history cannot override the statute's plain meaning, respondent and its supporters rely heavily on snippets of legislative activity on the subject of bribery and corruption reform in the late 1950s and early 1960s. Predictably, they approach the legislative history of section 201(c)(1)(A) by emphasizing what Congress did not do, rather than what it did. They lean heavily on the suggestion of a more general provision floated by Senator Keating, while glossing over the fact that Senator Keating never introduced his proposed amendment, thus foreclosing any possibility of discerning anything about Congress's intent from its failure to enact the proposal. Likewise, respondent points to a bill offered to the 85th Congress in 1958 as some type of guide to the legislative intent of the 87th Congress, which passed the statute in 1962. Respondent's Brief at p. 27.

The briefs of respondent, ALL, and NACDL also gloss over the fact that the Keating proposal was much broader than the interpretation of section 201(c)(1)(A) urged here by the United States, in that it forbade soliciting or receiving gifts from someone who the recipient "has reason to believe" is seeking favor. Respondent acknowledges that the proposal "would hold public officials strictly liable for soliciting or accepting certain gifts . . . ." Respondent's Brief at p. 28. Section 201(c)(1)(A), in contrast, is not under anyone's interpretation a strict liability statute – it requires that the

thing of value be given "for or because of any official act," a requirement that can be met, in appropriate circumstances, by a showing that the thing of value was motivated by the recipient's official position.

C. The Broad Language Of The Gratuities Statute Protects The Public From A Division Of Loyalties By Its Officials

The courts of appeals have repeatedly recognized that, when a private entity becomes a second source of income for a public official in a position to perform official acts in which it has an interest, the resulting division of loyalties is precisely what Congress addressed through section 201(c)(1)(A). *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986); *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965).[9] In particular, the Third Circuit recognized, in a

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[9] The principle that public officials should be forbidden to accept gifts that could divide their loyalties goes back to the earliest common law origins of the law of bribery, which proscribed officials' receipt of gifts from persons with matters before them:

> And to the intent that our Justices should do even right to all People . . ., without more favour shewing to one than to another, We have ordained and caused our said Justices to be sworn, that they shall not . . . take Fee nor Robe of any Man . . . , and that they shall take no Gift nor Reward by themselves, nor by other, privily nor apertly, of any Man that hath to do before them by any Way, except meat and drink, and that of small value . . . .

20 Edwardi, III. c.1 (1346) *reprinted in* STATUTES OF THE REALM, Vol. 1, pp. 303-04 (William S. Hein & Co., Inc. 1993). In certain situations, the common law's proscription against gifts to judicial officials reached the donor as well. *See* Henry III: The Provisions of Oxford (1258) ("no bailiff, by virtue of his office or of some plea, shall take any fee . . . And if he is convicted. . . . let him be punished; likewise the man who gives [the fee]") *reprinted in* Stephenson, C. and Marcham, F.G. (eds.), SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, Vol. 1, p. 145 (Harper & Row, rev.ed. 1972). *See also Perrin v. United States*, 444 U.S. 37, 43 (1979) (by time of Blackstone, crime of bribery covered judges and other judicial

decision that this Court affirmed (albeit without discussion on this point), that "[a]ll that was required in order to convict [the donor] was that the jury conclude that the gifts were given by him for or because of [the recipient's] official position, and not solely for friendship or social purposes;" the most telling evidence of this fact, again according to the Third Circuit, was the donor's admission that he gave the gifts "to establish rapport" with the recipient official. *United States v. Standefer*, 610 F.2d 1076, 1080-81 (3d Cir. 1979) (*en banc*), *aff'd* 447 U.S. 10 (1980).

Respondent dismisses the unlawful compensation rationale behind section 201(c)(1)(A) by referencing 18 U.S.C. § 203, another statute aimed at preventing federal officers and employees from taking outside compensation. Respondent's Brief at pp. 23-24, n.14. But this argument is a *non sequitur*; section 203 is not a substitute for section 201(c)(1)(A), and, if anything, strengthens the notion that a congressional purpose to deter unlawful compensation at least in part motivated this entire body of conflict of interest law.

Indeed, in interpreting another unlawful compensation statute, 18 U.S.C. § 209 (characterized along with section 201 as "one of almost two dozen statutory provisions addressing bribery, graft, and conflicts of interest that were revised and compiled at Chapter 11 of the Criminal Code in 1962," *Crandon v. United States*, 494 U.S. 152, 158-159 (1990)), this Court explained the legitimate breadth of this type of legislation:

> Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States. * * * * * Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is

officials and included giver as well as receiver of bribe), *citing* 4 W. BLACKSTONE, *Commentaries* 139-140 (1765)).

> supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service.

Id. at 164-65 (footnote omitted).

The crucial point, ignored by respondent and its supporters, is that a hair-splitting distinction between gratuities given for or because of an official act and those given for or because an official is in a position to perform an official act destroys Congress's carefully-crafted delineation between bribes and gratuities. As Judge Wald pointed out, this proposed distinction "would not pass the snicker test with laymen," App. 34, a conclusion neither respondent nor its supporters even attempt to dispute.

II. Even Assuming Error In The Jury Instructions, Any Such Error Was Harmless

With regard to the jury instructions, neither respondent nor its supporters come to grips with the import of the instructions as a whole.[10] Moreover, respondent confuses instructions stating necessary elements of the Government's proof with sufficient elements. *See* Respondent's Brief at p. 19.

[10] To avoid the issue entirely, respondent argues that the Government has "waived" it by not raising it before. However, the Court can consider questions that were "pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41-45 (1992). Here, the Court of Appeals held that "the charge failed to give the jury an adequate understanding of the issues, and the error cannot be called technical or harmless." App. 13 (citations omitted). Furthermore, the Court will receive and review closely related theories that are "fairly embraced" within the petition. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The question presented requires a determination of whether an element of the offense was *satisfied* with proof that the giving of the thing of value was motivated by the Secretary's official position. Thus, an appropriate review of the jury instructions necessarily entails conducting a harmless error analysis. Moreover, the Government notes that respondent urges this Court to craft the proper form of the instructions. Respondent's Brief at pp. 11-12.

Respondent asserts that "the *only* defense allowed to be presented to the jury was that Sun-Diamond acted out of pure friendship." Respondent's Brief at p. 48 (emphasis in original). Significantly, it gives no record citations for this bald assertion. In fact, respondent asked to present, and was allowed to present, numerous defenses: "friendship or social purpose" (App. 86, 89-90); no need to cultivate or develop a relationship (App. 89); gift was honorarium, not gratuity (*id.*); and lack of knowledge of gift (*id.*). Respondent was convicted, not because it could not present defenses to the jury, but because the jury did not accept its defenses.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court reverse the judgment of the D.C. Circuit, and reinstate respondent's conviction for violating the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A).

Respectfully submitted,

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No. 98-131

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

SUN-DIAMOND GROWERS OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

TABLE OF CONTENTS

	Page
Interest of the United States Department of Justice	1
Statement	2
Summary of argument	11
Argument:	
The federal gratuities statute, 18 U.S.C. 201(c)(1)(A), prohibits the giving of things of value to a federal official if, but only if, the gifts are motivated by official acts performed by the recipient in the past or by the recipient's capacity to perform such acts in the future	12
A. Section 201(c)(1)(A) does not prohibit gifts motivated by the recipient's official status or title if the donor is indifferent as to the manner in which the recipient's governmental power is exercised	14
B. Section 201(c)(1)(A) does not require the government to prove a nexus between a gratuity and a specifically identified official act	18
C. The state of mind of a donor in a Section 201(c)(1)(A) prosecution, like any other element of a criminal offense, may be proved by circumstantial as well as by direct evidence	21
Conclusion	28

TABLE OF AUTHORITIES

Cases:	
Cheek v. *United States*, 498 U.S. 192 (1991)	22
Crandon v. *United States*, 494 U.S. 152 (1990)	14
Mallette v. *Scully*, 752 F.2d 26 (2d Cir. 1984)	22
Morissette v. *United States*, 342 U.S. 246 (1952)	23
Sun-Diamond Growers of California v. *United States*, 119 S. Ct. 409 (1998)	4

Cases—Continued: Page

United States v. *Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976) 16
United States v. *Beck*, 615 F.2d 441 (7th Cir. 1980) 22
United States v. *Brewster*, 408 U.S. 501 (1972) 18
United States v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974) 3, 18, 19
United States v. *Bustamante*, 45 F.3d 933 (5th Cir.), cert. denied, 516 U.S. 973 (1995) 3, 15, 16
United States v. *Evans*, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978) 15, 16
United States v. *Gorman*, 807 F.2d 1299 (6th Cir. 1986), cert. denied, 484 U.S. 815 (1987) 15, 16
United States v. *Hudson*, 717 F.2d 1211 (8th Cir. 1983) 22
United States v. *Jones*, 16 F.3d 275 (8th Cir. 1994) 22
United States v. *Macko*, 994 F.2d 1526 (11th Cir. 1993) 22
United States v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978) 3, 18
United States v. *Ocampo-Guarin*, 968 F.2d 1406 (1st Cir. 1992) 22
United States v. *Standefer*, 610 F.2d 1076 (3d Cir. 1979), aff'd on other grounds, 447 U.S. 10 (1980) 15, 16
United States v. *Sun-Diamond Growers of California*, 964 F. Supp. 486 (D.D.C. 1997) 8, 12
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 22, 23

Statutes and regulations: Page

Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.* (1994 & Supp. II 1996) 1
28 U.S.C. 597(b) 1-2
Federal Election Campaign Act of 1971:
2 U.S.C. 441b(a) 4
2 U.S.C. 441f 4
5 U.S.C. 7353 3
5 U.S.C. 7353(a) 3
7 U.S.C. 5623 (1994 & Supp. II 1996) 5
18 U.S.C. 201-225 3
18 U.S.C. 201(a)(1) 2
18 U.S.C. 201(a)(3) 2, 19
18 U.S.C. 201(b) 2-3, 18
18 U.S.C. 201(b)(1) 3
18 U.S.C. 201(c) 1
18 U.S.C. 201(c)(1) 15, 18
18 U.S.C. 201(c)(1)(A) 2, 11, 14, 19, 23
18 U.S.C. 203 3
18 U.S.C. 209 3
18 U.S.C. 1343 4
18 U.S.C. 1346 4
5 C.F.R.:
Section 2635, Subpt. B 3
Section 2635.201 3
Section 2635.203(d) 3

Miscellaneous:

H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961) 11, 20

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ON WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE

INTEREST OF THE UNITED STATES DEPARTMENT OF JUSTICE

This prosecution arises under the federal gratuities statute, 18 U.S.C. 201(c), and was brought by Independent Counsel Donald C. Smaltz pursuant to the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.* (1994 & Supp. II 1996). The Ethics in Government Act of 1978 provides that "[n]othing in [the Act] shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding." 28 U.S.C.

597(b). Other than in prosecutions conducted by an Independent Counsel, the United States Department of Justice is responsible for the enforcement of the gratuities statute. The Department therefore has a substantial interest in the resolution of the issue of law presented in this case.

STATEMENT

1. Section 201(c)(1)(A) of Title 18 U.S.C. establishes criminal penalties of up to two years' imprisonment for any person who

> otherwise than as provided by law for the proper discharge of official duty * * * directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official.

18 U.S.C. 201(c)(1)(A) (emphasis added). The statute defines the term "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." 18 U.S.C. 201(a)(3). The term "public official" is defined to include any "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof." 18 U.S.C. 201(a)(1).

Although Section 201(c) does not contain the word "gratuity," the courts of appeals have repeatedly used that term to describe the payments forbidden by Section 201(c), and to distinguish the Section 201(c) offenses from the bribery offenses defined by 18 U.S.C. 201(b). See, *e.g.*, Pet. App. 7; *United States* v. *Brewster*, 506 F.2d 62, 68-72 (D.C. Cir. 1974); *United States* v. *Bustamante*, 45 F.3d 933, 935 (5th Cir.), cert. denied, 516 U.S. 973 (1995); *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978). Section 201(b) establishes criminal penalties of up to 15 years' imprisonment for any person who "directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent * * * to influence any official act." 18 U.S.C. 201(b)(1).[1]

2. Independent Counsel Donald C. Smaltz obtained a nine-count indictment against respondent Sun-Diamond

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[1] The provision of things of value to federal officers and employees is subject to various criminal provisions in addition to those included in Section 201. See, *e.g.*, 18 U.S.C. 203 (compensation to Members of Congress and other federal officers and employees in matters affecting the government); 18 U.S.C. 209 (supplementation of salaries of federal officers and employees); see generally 18 U.S.C. 201-225 (bribery, graft, and conflicts of interest).

Additional restrictions on the receipt of things of value by federal officers and employees are imposed by 5 U.S.C. 7353 and (with respect to Executive Branch officials) by regulations promulgated thereunder by the Office of Government Ethics. See 5 C.F.R. 2635, Subpt. B. Those regulations provide as a general rule, subject to specified exceptions, that federal employees are prohibited "from soliciting or accepting any gift from a prohibited source or given because of the employee's official position." 5 C.F.R. 2635.201. The term "prohibited source" is defined to include persons seeking official action by, doing business or seeking to do business with, or conducting activities regulated by the employee's agency, as well as persons whose interests may be substantially affected by the individual employee's performance or nonperformance of his official duties. 5 C.F.R. 2635.203(d); see 5 U.S.C. 7353(a). Those regulations define the obligations of federal employees and do not purport to govern the conduct of private donors.

Growers, Inc., a large agricultural cooperative. At issue in this case is respondent's conviction under Count I, which alleged that respondent had given unlawful gratuities to then-Secretary of Agriculture Mike Espy. Count I charged respondent with giving Espy tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524. Pet. App. 4.[2]

At the time of the gratuities alleged in Count I, Richard Douglas was employed by respondent as a senior vice president. Pet. App. 36. Douglas had attended college with Espy, and the two had remained close friends during the ensuing years. *Id.* at 2. Although the gifts in question were transferred to Espy through Douglas, the indictment alleged that respondent had reimbursed Douglas for the gifts, treating them as business expenses. *Id.* at 4.

The indictment identified two issues in which respondent had an interest in favorable action by the Secretary of Agriculture at the time when the alleged

[2] Count II of the indictment alleged a separate violation of Section 201(c)(1)(A). The jury acquitted respondent on that count. Pet. App. 4 n.1. Counts III and IV alleged violations of the federal wire fraud statute, 18 U.S.C. 1343 and 1346. Pet. App. 14. Counts V through IX alleged violations of the Federal Election Campaign Act of 1971, 2 U.S.C. 441b(a) and 441f. Pet. App. 14. The jury found respondent guilty on Counts III through IX. *Ibid.* The court of appeals affirmed the convictions on Counts III through IX but vacated the sentence imposed by the district court and remanded the case for resentencing. *Id.* at 31. Counts II through IX are not at issue in this Court. Respondent filed a cross-petition challenging the court of appeals' affirmance of the convictions on Counts III and IV. The Court denied that cross-petition. See *Sun-Diamond Growers of California* v. *United States*, 119 S. Ct. 409 (1998).

gratuities were bestowed. Pet. App. 3. First, respondent sought regulatory action that would have increased its members' chances of obtaining grants under the market promotion program, a program administered by the Department of Agriculture pursuant to statutory authority as a means of assisting U.S. agricultural exports. *Ibid.*; see 7 U.S.C. 5623 (1994 & Supp. II 1996). Second, respondent wanted then-Secretary Espy's help in persuading the Environmental Protection Agency to delay or reject a proposed phase-out of methyl bromide, a pesticide used by some of the growers who belonged to respondent's member cooperatives. Pet. App. 4.

3. a. The district court denied respondent's motion to dismiss the indictment. Pet. App. 35-66. With respect to Count I, respondent contended that the indictment was deficient because it "d[id] not allege that [respondent] provided things of value to reward Secretary Espy for a specific act he had already performed or was already committed to perform." *Id.* at 38. The district court framed the question before it as "whether, with respect to appointed officials, the gratuity statute requires the indictment to allege a nexus between the provision of things of value and a specific official act performed or committed to be performed by the appointed official." *Id.* at 41-42.

The court held that such a nexus was not required. "Rather," the court stated, "it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided simply because of the official's position, in appreciation of the relationship, or in anticipation of its continuation." Pet. App. 42 (internal quotation marks, brackets, emphasis, and ellipsis omitted). The court acknowledged that a

closer connection between a payment and an official act might be required in a prosecution of an elected official (see *id.* at 42-44), but it concluded that "in cases involving appointed officials, such as the present matter, it is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture," *id.* at 44.

b. Consistent with its ruling on the motion to dismiss the indictment, the district court repeatedly instructed the jury that the government was not required to prove a nexus between the alleged gratuities and any specific official action, and that respondent could properly be convicted based on proof that the gifts were motivated by Espy's "position." Thus, the jury was instructed that "to prove the offense of illegal gratuity, the government must prove that [respondent] knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, for or because of his official position." Pet. App. 83. See also *id.* at 84 ("the government [must] prove that the gratuity was given because of the public official's position"); *ibid.* ("The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value because of his official position whether or not the giver or receiver intended that particular official's acts be influenced."); *ibid.* ("The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return."); *id.* at 85 (Section 201(c) "does not require that [respondent] gave the gratuities with the intent to influence Secretary Espy. It is sufficient if [respondent] provided Espy with unauthorized compensation simply because he held public office."); *id.* at 86 ("In

order for you to convict [respondent] of violating the gratuity statute, you must find beyond a reasonable doubt that [respondent] gave the gifts to Mr. Espy for or because of Mr. Espy's official government position and not solely for reasons of friendship or social purpose."); *id.* at 87 ("The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.").

Other portions of the instructions indicated that respondent's status as an entity regulated by the Department of Agriculture was integral to the application of the gratuities statute. Thus, the court stated that

> the government must prove that the gratuity was knowingly and willingly given for or because of an official act performed or to be performed by the Secretary of Agriculture, Michael Espy. That means that the government must prove that [respondent] knowingly and willingly gave the gratuities, at least in part, because of the Secretary's position in appreciation of [respondent's] relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.

Pet. App. 87. The jury was further instructed that "[w]ith respect to official acts, the government has to prove that [respondent] gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture." *Id.* at 88. The jury found respondent guilty on Count I and Counts III through IX of the indictment.[3]

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[3] At the close of the government's case, respondent moved for judgment of acquittal with respect to all nine counts of the

4. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded the case for a new trial on Count I and for resentencing on Counts III through IX. Pet. App. 1-31. With respect to Count I of the indictment, respondent contended that (a) the indictment should have been dismissed for failure to allege a nexus between the gifts and any specific official act, and (b) the jury instructions were defective because they permitted a verdict of guilty based solely on a finding that the gifts were motivated by Espy's official position. *Id.* at 4-5. The court of appeals rejected respondent's challenge to the indictment but agreed with its claim of instructional error. *Id.* at 5. It therefore reversed the conviction on Count I. *Id.* at 5-13.

a. In addressing respondent's challenge to the jury instructions, the court of appeals stated that "[t]o satisfy the criminal intent requirement embodied in the phrase 'for or because of any official act,' the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts." Pet. App. 7. The court stated as well that "if Douglas furnished Espy with gifts merely to win his generalized sympathy for [respondent], those gifts would not be illegal gratuities, unless the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." *Id.* at 10. The court concluded

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indictment. See *United States* v. *Sun-Diamond Growers of California*, 964 F. Supp. 486, 488 (D.D.C. 1997). The district court denied that motion. *Ibid.* After the jury returned its verdict, respondent renewed its motion with respect to Counts III through IX, but not with respect to Count I. *Ibid.* The district court denied the renewed motion for judgment of acquittal. *Id.* at 494.

that the jury instructions given in this case failed to satisfy that standard:

> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

Id. at 12-13. Because the court concluded that "the charge failed to give the jury an adequate understanding of the issues," and that "the error cannot be called technical or harmless," it "reverse[d] and remand[ed] for a new trial on Count I." *Id.* at 13.

b. The court of appeals rejected respondent's contention that the indictment should have been dismissed because it failed to allege that the gratuities in question were earmarked for particular official acts. The court explained: "That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is required to find the requisite intent to

reward past favorable acts or to make future ones more likely." Pet. App. 13-14.[4]

5. The court of appeals denied the Independent Counsel's petition for rehearing and suggestion for rehearing en banc. Pet. App. 32-33. Judge Wald issued an opinion concurring in the denial of rehearing en banc. She explained:

> I read the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts. Nonetheless, I admit that the main distinction the panel draws between gifts motivated by an official's "position" and gifts motivated by an official's "acts" eludes me altogether. I suppose it is conceivable that someone might give gifts to a high official simply to create the impression that he is a "big shot" or "insider," without regard to how the official wields his power. But this hardly seems likely in the case of a regulated entity. Much more likely is the assumption that inherent in an official's "position" is his capacity to perform regulatory acts which will affect the gift-giver.

Id. at 34.

[4] The court of appeals also held that the district court had erred in sentencing respondent on Counts III through IX by (a) departing upward from the fine range established by the Sentencing Guidelines (see Pet. App. 26-30) and (b) imposing reporting requirements on respondent's member cooperatives (see *id.* at 30-31). The court therefore vacated the sentence imposed by the district court and remanded for resentencing. *Id.* at 31. The petition for a writ of certiorari does not challenge that aspect of the court of appeals' decision, and the question on which this Court granted certiorari does not encompass any sentencing issue.

SUMMARY OF ARGUMENT

1. Section 201(c)(1)(A) prohibits payments to a public official "for or because of any official act," and it therefore does not reach payments motivated by an official's position standing alone. It is possible to conceive of situations in which a donor may give things of value to a government officer because of the recipient's official status, while remaining indifferent as to the manner in which the recipient's official duties are performed. Absent any connection between a gift and the manner in which governmental power or influence is exercised, the gift is not properly characterized as one made "for or because of any official act." 18 U.S.C. 201(c)(1)(A).

2. Section 201(c)(1)(A) does not, however, require proof of a nexus between a gift to a public official and a specifically identified official act. If a gift to a public official is motivated at least in part by a desire to reward or influence the recipient's performance of his governmental responsibilities, or to generate a reservoir of goodwill that may influence future acts, the gift is properly characterized as one made "for or because of any official act performed or to be performed by" the official, 18 U.S.C. 201(c)(1)(A), whether or not the donor has a particular act in mind at the time the gift is made. Such a gift directly implicates the core concern underlying the various federal bribery and conflict-of-interest laws—*i.e.*, "[t]he principle * * * that a public servant owes undivided loyalty to the Government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 3 (1961). Thus, where a gift to a public official is moti-

vated by the recipient's capacity to exercise governmental power or influence in a manner favorable or unfavorable to the donor, the gift is proscribed by Section 201(c)(1)(A), regardless of whether the gratuity is linked to any specific official act.

3. As with any element of a criminal offense, the defendant's mental state may be proved by circumstantial as well as by direct evidence. Where a thing of value is given to a government official who has the authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. Although the jury is not required as a matter of law to draw that inference, it is generally allowed to do so; and a guilty verdict returned by a properly instructed jury on the basis of such evidence may not be set aside.

ARGUMENT

THE FEDERAL GRATUITIES STATUTE, 18 U.S.C. 201(c)(1)(A), PROHIBITS THE GIVING OF THINGS OF VALUE TO A FEDERAL OFFICIAL IF, BUT ONLY IF, THE GIFTS ARE MOTIVATED BY OFFICIAL ACTS PERFORMED BY THE RECIPIENT IN THE PAST OR BY THE RECIPIENT'S CAPACITY TO PERFORM SUCH ACTS IN THE FUTURE

This Court granted certiorari on the following question: "Is the requirement in 18 U.S.C. Sec. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?" 119 S. Ct. 402 (1998). That question cannot be answered with an unqualified "yes," at least if the term "official position" is understood to mean "official

title" or "official status." If a donor gives things of value to a government officer or employee because of the recipient's official status, but remains indifferent as to the manner in which the recipient's official duties are performed, the gifts would not be "for or because of any official act" within the meaning of Section 201(c)(1)(A). Gifts of that nature do not present the dangers at which the gratuities statute aims, and exclusion of such gifts from the scope of the statutory ban is consistent with the statutory language as well as its underlying purpose.

The "official act" requirement, however, must be understood in light of two related legal rules that govern its scope and application. First, a gift need not be linked to a specifically identified governmental action in order to fall within Section 201(c)(1)(A). Gifts that are intended to reward favorable official treatment in the past, or to increase the likelihood of such treatment in the future, are properly regarded as having been made "for or because of any official act." Second, the requisite intent may be established in a Section 201(c)(1)(A) prosecution (as in any other judicial proceeding) by circumstantial evidence. Thus, where a thing of value is provided to a government official having authority to act in matters affecting the donor's interests, the jury may properly infer that the gift is intended to reward or influence some (identified or unidentified) official act, even in the absence of direct evidence that such a purpose exists.

A. Section 201(c)(1)(A) Does Not Prohibit Gifts Motivated By The Recipient's Official Status Or Title If The Donor Is Indifferent As To The Manner In Which The Recipient's Governmental Power Is Exercised

Not all gifts to a government official that are motivated by the official's position violate the gratuities statute It is possible to imagine situations in which a donor may give things of value to a government officer or employee because of the recipient's official status or title, while remaining indifferent as to the manner in which the recipient's official duties are performed. For example, "it is conceivable that someone might give gifts to a high official simply to create the impression that he is a 'big shot' or 'insider,' without regard to how the official wields his power." Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc). Or a wealthy parent might provide financial assistance to a child who had accepted a low-paying government job in order to encourage the child to continue performing work that the parent regarded as admirable. Cf. *Crandon* v. *United States*, 494 U.S. 152, 175 (1990) (Scalia, J., concurring in judgment). Personal friends of a newly appointed high-level government official might organize a dinner, or contribute towards a gift, in order to celebrate the appointment. In each of those situations the gift would be made "because of" the recipient's official position, in the sense that the same gift would not be offered if the recipient were not a government officer or employee. Unless the gift is given with a view towards the *manner* in which official power or influence is (or is expected to be) exercised, however, the gift cannot plausibly be regarded as one made "for or because of any official *act*." 18 U.S.C. 201(c)(1)(A) (emphasis added).

As the court of appeals acknowledged (Pet. App. 11), some courts have framed the inquiry under Section 201(c)(1) as whether things of value were provided because of the recipient's official "position." See *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.) ("under the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty'"), cert. denied, 439 U.S. 870 (1978); *United States* v. *Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (en banc) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the recipient's] official position, and not solely for reasons of friendship or social purposes"), aff'd on other grounds, 447 U.S. 10 (1980); *United States* v. *Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986) ("The purpose of [the gratuities statute] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position."), cert. denied, 484 U.S. 815 (1987); cf. *United States* v. *Bustamante*, 45 F.3d 933, 940 (5th Cir.) (under the gratuities statute, "no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office"), cert. denied, 516 U.S. 973 (1995).

None of the cases cited above, however, specifically addresses the question whether Section 201(c)(1) is violated where a gift is motivated by the recipient's official status or title but the donor is indifferent as to the manner in which official power or influence is exercised. Rather, in each of those cases the donor possessed an evident interest in favorable treatment from the official to whom the gratuity was given. See

Evans, 572 F.2d at 481-482; *Standefer*, 610 F.2d at 1078; *Gorman*, 807 F.2d at 1305; *Bustamante*, 45 F.3d at 941. Those courts appear to have used the word "position" essentially to mean "capacity to render favorable treatment." Compare Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc) ("in the case of a regulated entity," it is likely "that inherent in an official's 'position' is his capacity to perform regulatory acts which will affect the gift-giver"); *United States* v. *Alessio*, 528 F.2d 1079, 1082 (9th Cir.) (rejecting sufficiency-of-the-evidence challenge to a donor's conviction under the gratuities statute because "[t]he jury could properly conclude from the testimony at trial that [the donor] knew [the recipient] was in a position to use his authority in a manner which would affect the conditions of confinement of [the donor's] father."), cert. denied, 426 U.S. 948 (1976).

As we explain below (see pp. 18-20, *infra*), a conviction under the gratuities statute does not require proof that the gift in question was earmarked for any specifically identified official act. It is sufficient to show that the gift was motivated by the recipient's perceived *capacity* to assist the donor through the exercise of his official power or influence, even if the particular acts that might affect the donor's interests "are neither specified nor even known at the time of the gift." Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc). It is clear, however, that Section 201(c)(1)(A) does not prohibit a donor from giving a thing of value to a government official if the gift is motivated by reasons (most obviously, personal friendship) unrelated to the actual or potential exercise of governmental power or influence. The statute requires proof that the gift is provided "for or because of any official act."

In stating that Section 201(c)(1)(A) prohibits gratuities given because of an official's "position," the courts of appeals appear simply to have recognized that the correct interpretation of that Section lies between the extremes described above. The government is not required to prove that a gratuity was linked to a specifically identified official act; but it is required to show that the gift was motivated, at least in part, by the recipient's capacity to exercise governmental power or influence in the donor's favor. That approach represents an appropriate reading of the statute. To say that a donor has given things of value because of the recipient's capacity to perform official acts favorable or unfavorable to the donor is equivalent, in practical effect, to saying that the gratuities have been given because of the acts that the recipient is capable of performing.

The term "position" is overbroad insofar as it would literally cover the hypothetical circumstance (see p. 14, *supra*) in which a gift is motivated by the recipient's status or title even though the donor is unconcerned with the manner in which official power or influence is exercised. The defendants in the cases cited above, however, do not appear to have suggested that such a benign motive animated *their* conduct or that the jury instructions would have permitted conviction based solely on an "official status or title" theory. Given the questions actually before those courts, use of the term "position" as a synonym for "capacity to act" was not an unnatural way of communicating the applicable legal standard.

B. Section 201(c)(1)(A) Does Not Require The Government To Prove A Nexus Between A Gratuity And A Specifically Identified Official Act

In the court of appeals, respondent argued that the indictment should have been dismissed because Section 201(c)(1)(A) "requires the government to prove a nexus between each unauthorized gift and some specifically identified official act—performed or hoped to be performed—for which the gift was given." Pet. App. 4; see also *id.* at 38 (respondent moved in district court to dismiss the indictment on the ground that it "d[id] not allege that [respondent] provided things of value to reward Secretary Espy for ā specific act he had already performed or was already committed to perform"). The courts below correctly rejected that contention. See *id.* at 13-14, 42-44. Such a requirement is not supported by the text of Section 201(c)(1)(A),[5] and it would substantially undermine enforcement of the gratuities ban.

Where a federal official has a continuing capacity to act on matters that will affect a particular entity, the regulated party has an obvious interest in keeping the public official favorably disposed as a general matter, regardless of the outcome of any particular decision. The generation and maintenance of such official goodwill falls within the statute, for ultimately a favorable

[5] The level of intent required under Section 201(c)(1) does not rise to the level required under the bribery statute, 18 U.S.C. 201(b). Criminal liability under the bribery statute requires proof of a quid pro quo between the donor and the recipient, see *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978); *United States* v. *Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974), though it does not require proof that the officer or employee who received the bribe actually performed the official act contemplated in the illicit agreement, see *United States* v. *Brewster*, 408 U.S. 501, 525-527 (1972).

attitude may be manifested in specific official acts. If a gift to a public official is motivated by a desire to influence the official's performance of his governmental responsibilities, the gift is therefore properly characterized as one made "for or because of any official act performed or to be performed by" the recipient, 18 U.S.C. 201(c)(1)(A), whether or not the donor has a particular act in mind at the time the gift is made.[6] Similarly, Section 201(c)(1)(A) applies to gifts made for the purpose of obtaining "insurance" against unfavorable governmental action, even where it is not clear that the recipient will ever be in a position to affect the donor's interests. For example, if an organized crime figure furnishes gifts to a United States Attorney, hoping that the United States Attorney will decline prosecution (or prosecute less vigorously) in the event that the donor or one of his subordinates comes to the attention of law enforcement authorities, the gifts would be made "for or because of" (potential) official action.[7]

Like other federal bribery and conflict-of-interest laws, the gratuities ban is grounded in "[t]he principle * * * that a public servant owes undivided loyalty to

[6] We address in this context appointed officials and do not address separate issues that may be raised in cases involving the provision of things of value to elected officials. Cf. *Brewster*, 506 F.2d at 73 n.26, 76-78.

[7] The term "official act" is broadly defined to include "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, *or which may by law be brought before any public official, in such official's official capacity.*" 18 U.S.C. 201(a)(3) (emphasis added). The italicized language supports the view that the term extends beyond specifically identified official actions and encompasses the full range of governmental conduct in which the federal officer or employee is *authorized* to engage.

the Government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 3 (1961) (discussing predecessor versions of conflict-of-interest statutes and stating that the principle of undivided loyalty "is as important today as when the first of these statutes was enacted more than a century ago"). Gifts intended to improve the "attitude" of a government official towards a regulated entity, or to enhance the official "relationship" between the two, are inconsistent with that principle of undivided allegiance. If the purpose of such a gratuity is to increase the ultimate likelihood of some official action favorable to the donor, the fact that the donor has no specific official act (or a wide variety of specific official acts) in mind at the time of the gift does not alter the fundamental illegitimacy of that goal. As the court of appeals recognized, "[t]hat an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely." Pet. App. 13-14; see also pp. 15-17, *supra*.[8]

[8] Some language in the court of appeals' opinion in this case comes close to suggesting that Section 201(c)(1)(A) requires proof of a nexus to an identified official act. Taken as a whole, however, the opinion is consistent with our approach. The court did state that "a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts." Pet. App. 8. But the court did not hold that that scenario exhausts the reach of the statute. In rejecting respondent's challenge to the indictment, the court correctly indicated that a gift motivated by the hope of generally favorable future official treatment would run afoul of Section 201(c)(1)(A). *Id.* at 13-14. Likewise, Judge Wald's opinion concurring in the denial of rehearing en banc stated that she "read[s] the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts." *Id.* at 34.

C. The State Of Mind Of A Donor In A Section 201(c)(1)(A) Prosecution, Like Any Other Element Of A Criminal Offense, May Be Proved By Circumstantial As Well As By Direct Evidence

The question whether a gift was given "for or because of any official act" goes to the state of mind of the donor. Even if the donor is subject to the regulatory authority of the recipient, or may otherwise be affected by the recipient's official conduct, a gift does not violate Section 201(c)(1)(A) if it is motivated by reasons (*e.g.*, personal friendship) unrelated to the actual or potential exercise of governmental power or influence. Thus, the fact that a Cabinet Secretary may have matters before him that could affect a donor's business interests does not, in and of itself, establish as a matter of law that a gift to the Secretary violates Section 201(c)(1)(A). Rather, the jury must conclude that the recipient's capacity to exercise official power or influence served, at least in part, as the motivation for the gift.

It is well established, however, that

> [b]ecause intent is formed in the mind in secrecy and silence and the human mind functions at a speed impossible to measure, a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable. Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities.

Mallette v. *Scully*, 752 F.2d 26, 32 (2d Cir. 1984) (citation omitted). Accord, *e.g.*, *United States* v. *Jones*, 16 F.3d 275, 278 (8th Cir. 1994); *United States* v. *Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993); *United States* v. *Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983); *United States* v. *Beck*, 615 F.2d 441, 449 (7th Cir. 1980). This Court has recognized, for example, that while knowledge of likely anticompetitive effects is a necessary element of a criminal antitrust violation, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443-444 (1978), "an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted," *id.* at 446. See also, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 203-204 (1991) (where knowledge of illegality is an element of a criminal tax violation, the unreasonableness of a defendant's purported opinion that his conduct was lawful may cause the jury to conclude that the opinion was not sincerely held); *United States* v. *Ocampo-Guarin*, 968 F.2d 1406, 1410 (1st Cir. 1992) (intent to distribute narcotics may be inferred from the quantity of drugs involved).

In light of the jury's authority to infer intent from surrounding circumstances, where a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. The defendant in such a case is entitled to argue to the jury that the gift was made for reasons unrelated to any actual or potential official conduct. But while the jury may not be required as a matter of law to infer that the gift was made "because of" the official's capacity to exercise governmental

power, it is generally allowed to do so; and a guilty verdict returned by a properly instructed jury on the basis of such evidence may not be set aside. Compare *United States Gypsum Co.*, 438 U.S. at 446; *Morissette* v. *United States*, 342 U.S. 246, 276 (1952).

CONCLUSION

For the reasons stated above, 18 U.S.C. 201(c)(1)(A) prohibits the giving of things of value to federal officials if, but only if, the gifts are motivated by official acts performed by the recipient in the past or by the recipient's capacity to perform such acts in the future.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. § 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SECTION 201(c)(1)(A) DOES NOT CRIMINALIZE GIFTS MOTIVATED BY THE RECIPIENT'S OFFICIAL POSITION	4
A. Section 201(c)(1)(A)'s Plain Language Reaches Only Gifts Given For Or Because Of An Official Act	4
B. In Enacting Section 201(c)(1)(A), Congress Considered, But Did Not Adopt, Proposals To Make "Status" Gratuities Unlawful	11
C. This Court's Precedents Have Not Suggested That Section 201(c)(1)(A) Prohibits Anything Other Than Gifts Motivated By An Official Act	16
II. SECTION 201(C)(1)(A) CRIMINALIZES ONLY GIFTS MOTIVATED BY A SPECIFICALLY IDENTIFIED OFFICIAL ACT	18
III. GIFTS MOTIVATED BY A PUBLIC OFFICIAL'S POSITION OR CAPACITY TO PERFORM OFFICIAL ACTS ARE PROHIBITED UNDER EXISTING RULES AND REGULATIONS	23
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Blessing v. *Freestone*, 520 U.S. 329 (1997) 19

Crandon v. *United States*, 494 U.S. 152 (1990) 7

Dowling v. *United States*, 473 U.S. 207 (1985) 10

McBoyle v. *United States*, 283 U.S. 25 (1931) 11

Morning v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973) 10

Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993) 5

Roberts v. *Galen of Virginia, Inc.*, No. 97-53, slip op. (Jan. 13, 1999) 18

Salinas v. *United States*, 118 S. Ct. 469 (1997) 20

Standefer v. *United States*, 447 U.S. 10 (1980) 17

United States v. *Bass*, 404 U.S. 336 (1971) 10

United States v. *Brewster*, 408 U.S. 501 (1972) 16, 17

United States v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974) 5

United States v. *Bristol*, 473 F.2d 439 (5th Cir. 1973) 7

United States v. *Gonzales*, 520 U.S. 1 (1997) 20

United States v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) 9

United States v. *Jennings*, 160 F.3d 1006 (4th Cir. 1998) 5, 20

Page

United States v. *Johnson*, 621 F.2d 1073 (10th Cir. 1980) 21

United States v. *Patel*, 32 F.3d 340 (8th Cir. 1994) 6

United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 4

United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) 6

United States v. *Seuss*, 474 F.2d 385 (1st Cir. 1973) 7

United States v. *Williams*, Cr. No. 96-314 (JR) (D.D.C.) (Sept. 30, 1997) 25

United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) 10

STATUTES

Pub. L. No. 87-849, 76 Stat. 1119 (1962) 11

5 U.S.C. § 7353 6

18 U.S.C. § 201(b)(1)(A) 9

§ 201(a)(3) 5

§ 201(c) ..... *passim*

§ 201(c)(1)(A) ..... *passim*

§ 201(f) 16

§ 209(a) 4, 7

§ 212 7

21 U.S.C. § 622 ..... 6, 25

Page

FEDERAL REGULATIONS

5 C.F.R. § 2635.106 25

§ 2635.202(a) 24

§ 2635.202(a)(2) 6

§ 2635.202(b) 26

§ 2635.203(d) 24

§ 2635.203(e) 24

§ 2635.204 25

§ 2635.204(a) 25

§ 2635.204(b) 25

§ 2635.204(c)-(*l*) 25

§ 2635.204(g)(1) 25

§ 2635.204(g)(4) 25

§ 2635.204(j) 25

§ 2638.501 25

Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33780 (1991) 26

LEGISLATIVE HISTORY

Conflicts of Interest: Hearings Before the Senate Judiciary Comm., 87th Cong., 2d Sess. (1962) 14, 15

Page

Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary, 87th Cong., 1st Sess. (1961) 13

H.R. 3050, Title I, § 9(b) (1961) 14

H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961) 13

H.R. Res. 9, 106th Cong., 1st Sess. (1999) (enacted) 27

S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 3852 ..... 11, 13

Staff of the House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* (1958) 11, 12

104 Cong. Rec. 2352 (1958) 13

104 Cong. Rec. 2353 (1958) 13

104 Cong. Rec. 2354 (1958) 13

108 Cong. Rec. 11,258 (1962) 15

108 Cong. Rec. 21,987 (1962) 16

RULES

Code of Conduct for United States Judges, Canon 5 27

Canon 5C(4) 27

Canon 5C4(a) 28

Canon 5C(4)(h)(ii) 28

Page

H.R. Rule LII(1)(a) 26

LII(1)(c) 27

S. Rule XXXV(1)(a)(1) 27

XXXV(1)(a)(2) 27

XXXV(1)(c) 27

Sup. Ct. R. 14.1(a) 19

OTHER AUTHORITIES

Webster's New Universal Unabridged Dictionary (2d ed. 1983) 8, 20

Webster's II New Riverside University Dictionary (1984) 20

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that Petitioner and Respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

SUMMARY OF ARGUMENT

I. The federal gratuity statute makes it illegal to give a gift to a public official "for or because of any official act performed or to be performed by such public official." 18 U.S.C. § 201(c)(1)(A). By its plain terms, the statute requires that the gift be motivated by an "official act" – that is, in order to have committed a crime, the defendant must have acted with the specific intent to influence or reward some "official act." The statute simply does not reach gifts motivated merely by the recipient's "official position" or "status." The Independent Counsel's reading of the statute to the contrary is not only at odds with § 201(c)(1)(A)'s unmistakeable language, but also with its legislative history and this Court's prior decisions interpreting the statute.

II. Nor – as the Solicitor General contends – does § 201(c)(1)(A) reach gifts motivated merely by the recipient's "capacity" to perform official acts. The statute no more proscribes gifts motivated by a public official's "capacity" to exercise governmental power than it proscribes gifts motivated by a public official's "position" or "status." Although Congress used the expansive adjective "any" to modify "official act," the word "any" means *at least one*. Thus, in order to constitute a crime under § 201(c)(1)(A), the defendant must act with the specific intent to influence or reward at least one "official act" either already completed or to be performed in the future by the recipient. In order for this specific intent requirement to make any sense, the defendant must have had in mind, at the time he acted, the official act or acts "for or because of" which he gave the gift. It is not enough, as the Solicitor General contends, for the government to show that the defendant merely intended to create a "reservoir of goodwill" which might, at some unknown time in the future, redound to his benefit in some unidentified matter.

III. Finally, the interpretations of § 201(c) urged by both the Independent Counsel and the Solicitor General would render a virtual nullity the detailed and finely-nuanced rules and regulations which currently govern the acceptance of gifts by public officials. These rules – which have been adopted in appropriately differing forms by all three Branches – set forth comprehensive ethical standards controlling the conduct of federal officials. Section 201(c) should not be construed to sweep away these regulatory standards and impose instead a flat felony prohibition on gifts either motivated by the

recipient's "position" or given by a regulated entity to a regulator.

The judgment of the court of appeals should be affirmed.

ARGUMENT

I. SECTION 201(c)(1)(A) DOES NOT CRIMINALIZE GIFTS MOTIVATED BY THE RECIPIENT'S OFFICIAL POSITION.

A. Section 201(c)(1)(A)'s Plain Language Reaches Only Gifts Given For Or Because Of An Official Act.

1. "The task of resolving [a] dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The federal gratuity statute provides, in pertinent part:

> Whoever . . . otherwise than as provided by law . . . gives, offers, or promises anything of value to any public official . . . *for or because of any official act performed or to be performed by such public official* . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1)(A) (emphasis added). In this statute, Congress did not make it a crime simply to "give[ ], offer[ ], or promise[ ] anything of value to any public official," as it has proscribed in other contexts. Cf. 18 U.S.C. § 209(a) (prohibiting salary supplementation of public officials).

Instead, Congress required that there be a specific relationship – "for or because of" – between the defendant's giving the gratuity and something done or to be done by the official – "any official act performed or to be performed by such public official." In other words, Congress required that the gift must be given by the defendant with a particular, proscribed intent: to influence or at least reward, either retrospectively or prospectively, the performance of an official act.

Lest there be any doubt about what was being made criminal, Congress specifically defined the term "official act" as:

> any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Id. § 201(a)(3) (emphasis added). If these words are given their ordinary and common meanings, see *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993), it is clear that § 201(c)(1)(A) does not make it a crime to give a thing of value to a public official merely because of the official's "position" or "status." The plain language of the statute makes it a crime to give a thing of value to a public official *only* when the thing of value is given "for or because" of a "decision or action" performed or to be performed by the public official. See *United States* v. *Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974); see also *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("An illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission)

that the payor expected to occur in any event."); *United States* v. *Patel*, 32 F.3d 340, 344-45 (8th Cir. 1994) (same). As the First Circuit observed in construing a virtually identical state gratuity statute, "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.'" *United States* v. *Sawyer*, 85 F.3d 713, 735 (1st Cir. 1996). Indeed, although the definition of "official act" encompasses a broad array of official decisions and actions – including both past and future decisions and actions – an official's "position" is not under any reasonable stretch of the legal imagination a "decision or action" "performed or to be performed by such public official." See *infra* at 8-11. While gifts motivated by the recipient's official position may run afoul of the numerous ethics regulations governing gifts to public officials, see *infra* at 23-28, they simply are not crimes under § 201(c)(1)(A).

Had Congress wished to make gifts motivated by an official's "position" or "status" a crime, it could easily have done so. Compare 5 C.F.R. § 2635.202(a)(2) (prohibiting federal employees from accepting gifts "[g]iven because of the employee's official position"); 5 U.S.C. § 7353 (prohibiting federal officials from accepting gifts from persons who might be affected by the official's acts). In fact, in some circumstances, Congress has even chosen to make gifts to public officials illegal without regard to the motivation of the donor. For example, Congress has made it unlawful for federal meat inspectors to accept from persons engaged in commerce anything of value "given with any purpose or intent whatsoever." 21 U.S.C. § 622. Plainly, this is a very different offense from the

criminal gratuity provisions of § 201(c), which demand proof of "a *causal relationship* [of the gratuity] to specific [official] acts." *United States* v. *Seuss*, 474 F.2d 385, 389 (1st Cir. 1973) (emphasis added).

Indeed, Congress included in the same chapter of title 18 that contains § 201(c) two provisions making gratuities to public officials crimes without regard to the motivation of the donor. In 18 U.S.C. § 209(a), Congress prohibited "salary supplementation" of public officials without regard to the purpose for the payment. This Court has acknowledged the unusual breadth of § 209 as a "prophylactic rule[ ] . . . intended to prevent even the appearance of wrongdoing." *Crandon* v. *United States*, 494 U.S. 152, 164 (1990). Likewise, in 18 U.S.C. § 212, Congress made it a crime for a bank employee to give a bank examiner "any loan or gratuity," without regard to the purpose for which the gratuity is given. Unlike § 201(c)(1)(A), § 212 does not require any connection between the gratuity and performance or anticipated performance of any official act. Cf. *United States* v. *Bristol*, 473 F.2d 439, 443 (5th Cir. 1973) (18 U.S.C. § 213, prohibiting receipt of gratuity, requires only general intent to receive the gratuity).

The court of appeals thus correctly held, see Pet. App. at 5-11, and the Solicitor General concedes, see S.G. Br. at 13, 18, that § 201(c)(1)(A)'s plain language – which requires that a gift be given "for or because of any official act" in order to constitute a felony – does not reach gifts motivated merely by a public official's "position" or "status." On the contrary, by its plain terms, the statute makes criminal only those gifts motivated by an "official act" – that is, in order to have committed a crime, the

defendant must have acted with the specific intent to influence or reward some "official act."

2. Despite the clarity of the words enacted into law by Congress, the Independent Counsel attempts to rescue Respondent's conviction by contending that the words used in the district court's jury instructions – official "position" or "status" – are, at least where a regulated company is concerned, acceptable shorthand for "official act." See Pet. Br. at 18-26.[2] That contention must be rejected.

First, and most obviously, the statute does not use the words "position" or "status." It uses the phrase "official act," which in turn is defined as an official "decision or action." The word "position" (*i.e*, "office; post; employment; situation; job," *Webster's New Universal Unabridged Dictionary* 1405 (2d ed. 1983) (hereinafter *Webster's New Universal*)) is simply not a synonym of the words "decision" (*i.e.*, "the act of making up one's mind," *id.* at 471) or "action" (*i.e.*, "the doing of something," *id.* at 20). Indeed, they are no more synonymous than are "seat in Congress" and "vote on legislation" or "judge" and

[2] While the Solicitor General stops short of advocating such violence to the statutory language, he proposes an interpretation of the statute which is functionally indistinguishable: While § 201(c)(1)(A) reaches only gifts motivated by an "official act" – and not those motivated by the officials "position" or "status" – the government need not prove or even identify the "official act" "for or because of" which the gift was given. *See* S.G. Br. at 19-22. As demonstrated below, *see infra* at 18-23, this analysis is equally flawed.

"order."[3] Permitting a jury to convict a defendant of giving a gift to a public official "for or because of any official act" based upon a finding that the defendant gave the gift merely "for or because of" the official's "position" would thus permit conviction on proof of conduct which Congress has not made a crime, which is plainly impermissible. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (only Congress may prescribe federal crimes).

Second, the interpretation of § 201(c)(1)(A) advocated in the Independent Counsel's brief would require courts to draw an untenable and wholly arbitrary distinction between classes of individuals accused of giving illegal gratuities. In an attempt to disavow the insupportable position that *all* gifts motivated by the recipient's "position" are illegal, see S.G. Br. at 17-18, the Independent Counsel answers the Court's formulation of the question presented with a "qualified 'Yes.' " Pet. Br. at 17. According to the Independent Counsel, individuals accused of giving gifts to public officials with regulatory jurisdiction over them could be convicted upon proof that the gift was motivated by the recipient's "official position." Individuals charged with giving gifts to public officials who "ha[ve] not been, [are] not currently, and [are] not likely ever to be in a position to regulate" them, Pet. Br. at 18, in

[3] Further evidence that "official act" as it is used in § 201(c)(1)(A) does not mean "official position" is found in the correlative provision of the federal bribery statute, which prohibits corrupt gifts intended "to influence any official act." 18 U.S.C. § 201(b)(1)(A). Reading "official act" to mean "official position" would make § 201(b)(1)(A) nonsense, since one cannot corruptly influence an "official position."

contrast, could be convicted only upon proof that the gift was given for or because of an "official act." The statute, however, makes no such distinction between potential defendants. By its terms, it makes criminal only those gifts that are motivated by an "official act," regardless of the relationship between the donor and the recipient of the gift.[4]

Finally, although § 201(c)(1)(A) unambiguously reaches only gifts given "for or because of any official act" and *not* gifts motivated merely by a public official's "position" or "status," any doubt on this issue must be resolved in Respondent's favor. See *United States* v. *Bass*, 404 U.S. 336, 347 (1971). It is a bedrock principle of American jurisprudence that criminal statutes are construed *narrowly*, not broadly. See, *e.g.*, *Morning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 375 (1973); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). This canon of statutory construction is grounded both in deference to the prerogatives of Congress, to which is committed the sole power to define federal crimes, see *Dowling* v. *United States*, 473 U.S. 207, 213 (1985), and in a concern that "a fair warning should be given to the world in language that the common world

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[4] It is also unclear who would fall into the latter category of potential defendants since, in the Independent Counsel's view, "official act" means "official position" whenever the recipient "may at some unknown, unspecified later time, be in a position to act favorably to the giver's interests," Pet. Br. at 22, even when what the official might do to favor the donor is not "yet identifiable," *id.* at 19.

will understand, of what the law intends to do if a certain line is passed," *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Section 201(c)(1)(A) must accordingly be limited to gifts actually motivated by an "official act" either already completed or to be performed in the future by the recipient.

B. In Enacting Section 201(c)(1)(A), Congress Considered, But Did Not Adopt, Proposals To Make "Status" Gratuities Unlawful.

Section 201(c)(1)(A)'s legislative history confirms that it does not reach gifts motivated by the recipient's official "position." Congress passed the gratuity statute, 18 U.S.C. § 201(c), in 1962 as part of an effort to rationalize and consolidate the federal conflict-of-interest and bribery provisions that were then dispersed in nine separate sections throughout the United States Code. See Pub. L. No. 87-849, 76 Stat. 1119 (1962); S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853 ("S. Rep. No. 2213"); Staff of the House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 65 (1958) ("House Staff Report"). All nine sections prohibited attempts to influence specified officials in the performance of an official act, but five also prohibited gratuities – *i.e.*, things of value given for an official act, but without proof of a *quid pro quo*. *House Staff Report* at 67.

In its 1958 report, the House Judiciary Committee Staff recommended that a "new section should . . . uniformly prohibit all payments and receipts 'for' official action" for all federal officials. *Id.* at 72. As the Staff

explained, "a practice of tacitly 'rewarding' public officials *for their official acts* could undermine the public service as effectively as if the payments were the fruit of express corrupt agreement." *Id.* (emphasis added). Consonant with the eventual language of § 201(c) as interpreted by the court of appeals, the report recommended making illegal "the payment or receipt of anything of value *in appreciation of, or as a reward for an official act. . . .* " *Id.* (emphasis added). The Staff indicated that the difficult issue was whether the criminal law should extend beyond transactions where a bribe was given as a *quid pro quo* for official action:

> While it may at first blush seem harsh to impose a severe penalty for making or receiving a gift for which no corrupt consideration has been given, it is readily apparent that a practice of tacitly "rewarding" public officials for their official acts could undermine the public service as effectively as if the payments were the fruit of express corrupt agreement. . . . It is accordingly recommended that payments to and receipts by public officials *for their official acts* be prohibited as bribery.

Id. (emphasis added). The Committee Staff did not recommend that the gratuity statute be extended beyond gratuities made "for or because of" an official act. The Staff specifically noted that another bill, S. 3306, which had been introduced in 1958, "goes further, and would outlaw gifts to Government officials by interested parties, irrespective of purpose or intent." *Id.* at 72 n.33.[5]

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[5] In introducing S. 3306, Senator Proxmire stated: "I introduce . . . a bill to prohibit the making of gifts to officials of Government agencies by persons having business with such agencies, and to prohibit the acceptance of such gifts." 104 Cong. Rec. 2353 (1958). After it was introduced, S. 3306 was referred to the Committee on the Judiciary. *See* 104 Cong. Rec. 2352, 2354. No further action was ever taken on the bill.

In line with the staff's recommendations, the chairman and ranking minority member of the House Judiciary Committee introduced identical bills (H.R. 3411 and 3412) containing uniform prohibitions against paying gratuities to federal officials for or because of their official acts. See S. Rep. No. 2213, at 3853; H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961); *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) (hereinafter *House Conflict of Interest Hearings*). Those prohibitions, with changes not relevant here, survived in the bill (H.R. 8140) that Congress passed in 1962, see H.R. Rep. No. 748, at 15-16, and were codified as § 201(c).

In the course of developing H.R. 8140, the House Judiciary Committee considered another bill, H.R. 3050, that involved reform of the conflict-of-interest laws, but did not address the existing bribery and gratuity laws, including the provisions for illegal gratuities paid for official acts. Cf. S. Rep. No. 2213, at 3853; H.R. Rep. No. 748, at 8. Among the reforms that H.R. 3050 proposed was a prohibition on certain gifts to federal government employees:

> GIFTS. – No person shall give, transfer, or deliver, directly or indirectly, to a Government

employee any thing of economic value as a gift, gratuity, or favor if either –

> (1) such person would not give the gift, gratuity, or favor *but for such employee's office or position within the Government*; or
>
> (2) such person [has contractual relations with the employee's agency, is regulated by that agency, or has interests that might be substantially affected by the employee's performance or nonperformance of official duty].

H.R. 3050, Title I, § 9(b) (1961), *reprinted in House Conflict of Interest Hearings* 11 (emphasis added). This prohibition on gifts – which bears a striking similarity to how the Independent Counsel would construe § 201(c)(1)(A) – was intended to be enforced primarily by agency administrative measures authorized in §§ 10-12 of the bill, see *id.* at 11-14, 110 (statement of Rep. Lindsay), although the bill would also have authorized criminal prosecutions for knowing or purposeful violations of its provisions, see *id.* at 14.

The prohibition in H.R. 3050 on gifts given because of an "employee's office or position within the Government" was not included in H.R. 8140 and was never enacted into law. Roswell Perkins, who chaired the New York City Bar Association subcommittee that drafted H.R. 3050, testified before the Senate Judiciary Committee that *only* "gifts with a provable attempt to influence an official act are squarely covered by the bribery sections [of H.R. 8140]. That much we can concede." *Conflicts of Interest: Hearings Before the Senate Judiciary Comm.*, 87th Cong., 2d

Sess. 43 (1962) (hereinafter *Senate Conflict of Interest Hearings*).

In an attempt to restore the prohibition on gifts motivated by the recipient's official "position," Senator Keating offered an amendment to H.R. 8140 that would have banned gifts to federal employees "if the employee ha[d] reason to believe the donor would not give the gift but for the employee's position." *Id.* at 10, 15. Senator Keating explained that, with his amendment, "the bill would bar gifts to Federal employees from donors having business relations with the employee's agency or where the donor conducts operations regulated by the employee's agency. Such obvious attempts at influence peddling or the purchasing of goodwill should be strictly prohibited." *Id.* at 10. Notably, Senator Keating's amendment would have imposed only civil administrative – not criminal – penalties for violations. See 108 Cong. Rec. 11,258 (1962); *Senate Conflict of Interest Hearings* at 25. In response, the Department of Justice submitted testimony that the Keating amendment was unnecessary in light of the existing agency regulations and executive orders that already prohibited the acceptance of "status" gifts by government employees. *Id.* H.R. 8140 was subsequently enacted into law without the Keating amendment.

The legislative history thus refutes the Independent Counsel's claim that § 201(c) prohibits gifts motivated by the recipient's official "position."[6] Gifts of that kind – so-

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[6] The Independent Counsel argues that this history should be ignored because Senator Keating chose not to introduce his amendments in the Senate. *See* Pet. Br. at 37. While it is true the Keating amendments were not debated, Senator Keating's

called "status" gratuities – were considered by Congress to be *ethical* matters best handled by administrative regulation or executive order, not the criminal laws. After receiving testimony that the existing ethical regulations made such a statutory prohibition superfluous, both the House and Senate Judiciary Committees rejected those bills or amendments. The expansive reach ascribed to the *criminal* gratuity provisions of § 201(c) by the Independent Counsel was contemplated by Congress and was rejected.

C. This Court's Precedents Have Not Suggested That Section 201(c)(1)(A) Prohibits Anything Other Than Gifts Motivated By An Official Act.

This Court's prior decisions interpreting § 201(c) and its predecessor, 18 U.S.C. § 201(f), provide no support for the Independent Counsel's argument that § 201(c)(1)(A)'s requirement that the gift be given "for or because of any official act" is satisfied by a showing that the gift was motivated by the recipient's "official position." In *United States* v. *Brewster*, 408 U.S. 501 (1972), the Court clearly

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decision not to introduce his amendments for fear of jeopardizing passage of the bill, *see* 108 Cong. Rec. 21,987 (1962) ("We have been advised that any *substantial* amendments would create great, if not insuperable, obstacles to the passage of the bill in the other body." (emphasis added)), shows that expanding the anti-gratuity provisions to reach gifts motivated by the recipient's "official position" was understood as a substantial extension of the language eventually enacted as § 201(c).

stated that to sustain a conviction under § 201(c)'s predecessor, "it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for *an* official act." *Id.* at 527 (emphasis added). The language on which the Independent Counsel places undue reliance, see Pet. Br. at 27, is not to the contrary, but merely reiterates the Court's conclusion that "the Government need not show any act of [the defendant] subsequent to the corrupt promise for payment," because "it is *taking* the bribe, not performance of the illicit compact, that is a criminal act." 408 U.S. at 526.

The Independent Counsel's reliance on *Standefer* v. *United States*, 447 U.S. 10 (1980), is similarly misplaced. In *Standefer*, the Court dismissed Petitioner's challenge to the "instructions to the jury on criminal intent," by announcing in a footnote that it "agree[d] with the Court of Appeals that the instructions were correct." *Id.* at 14 n.8. However, the jury instructions affirmed by this Court very clearly required the jury to find that the gifts at issue were motivated by an "official act," not by the recipient's "official position." In its jury instructions, the district court carefully described the intent required for a gift to violate the gratuity statute, explaining that "it is not necessary that [the jury] find the defendant gave such things of value with the intent of influencing an Internal Revenue Agent in performing *his audit or audits of Gulf Oil Corporation's returns.*" Appendix, *Standefer* v. *United States*, No. 79-383, Tr. at 16 (emphasis added).[7] The

---

[7] The district court's instructions in *Standefer* were reprinted in the Appendix filed with this Court and are available through LEXIS. *See* Pet. Br. at 28 n.9.

court continued, "[i]t is sufficient if the defendant made these payments because of a desire to create a better atmosphere with [the IRS agent] with respect to *the performance of the audit*." *Id.* (emphasis added). Thus, the instructions which this Court affirmed – without explanation – did not dispense with § 201(c)(1)(A)'s requirement that the gift be motivated by a specific "official act" or relieve the government of the burden of identifying that act.

II. SECTION 201(c)(1)(A) CRIMINALIZES ONLY GIFTS MOTIVATED BY A SPECIFICALLY IDENTIFIED OFFICIAL ACT.

Both the court of appeals and this Court framed the issue presented by this case narrowly as whether a gift motivated by the recipient's official position is given "for or because of any official act" within the meaning of § 201(c)(1)(A). Although he disclaims the Independent Counsel's "status" gratuity theory, the Solicitor General advances a far broader theory of criminal liability under the gratuity statute. Indeed, the Solicitor General would interpret § 201(c)(1)(A) to relieve the government entirely of the burden of proving the specific relationship between the defendant's giving the gratuity and something done or to be done by the official that Congress required in order for a gift to a public official to be a crime.[8]

---

[8] The issue raised by the Solicitor General's broader argument is not fairly included in the question on which this Court granted *certiorari* and was not addressed by the court of appeals. This Court accordingly may decline to address the issue. *See, e.g., Roberts* v. *Galen of Virginia, Inc.*, No. 97-53, slip op. at 5 (Jan. 13, 1999); *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997); Sup. Ct. R. 14.1(a).

Although he concedes that the gratuity statute does not reach gifts motivated by the recipient's "official position," the Solicitor General contends that "where a gift to a public official is motivated by the recipient's *capacity* to exercise governmental power or influence in a manner favorable or unfavorable to the donor, the gift is proscribed by Section 201(c)(1)(A), regardless of whether the gratuity is linked to any specific official act." S.G. Br. at 12 (emphasis added). Further, the government need not even identify the official act "for or because of" which the gift was allegedly given. *Id.* at 18. Instead, "where a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, *based on that relationship alone*, that the gift" violated § 201(c)(1)(A). *Id.* at 24 (emphasis added). In the Solicitor General's view, a defendant could be convicted of giving a thing of value to a public official "for or because of any official act performed or to be performed" based solely on proof that he gave a gift to a public official whose actions might someday affect his interests, even though the "official act" motivating the gift is not (or cannot) be identified.[9]

---

[9] The Independent Counsel presents a much more blunt, though functionally indistinguishable, formulation of the Solicitor General's argument: "The donor's conduct in giving gifts to the very official who regulates the donor is, *by the statute's own definition*, 'for or because of any official act performed or to be performed.' " Pet. Br. at 25 (emphasis added). *See also id.* at 23 ("[T]he statute effectively reaches anything of value given because an official is in a 'position' to take action affecting the donor. . . . ").

The Solicitor General's argument proceeds from a fundamentally flawed premise. The statute no more proscribes gifts motivated by a public official's "capacity to exercise governmental power" than it proscribes gifts motivated by a public official's "position" or "status." See *supra* at 4-11. The statute prohibits *only* gifts given "for or because of any official act performed or to be performed." Although this Court has read the word "any" expansively, see, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning. . . . "), it consistently has construed "any" to mean *at least one*, see, *e.g.*, *Salinas* v. *United States*, 118 S.Ct. 469, 473 (1997). See also *Webster's II New Riverside University Dictionary* 115 (1984) (defining "any" as "One or some, regardless of sort, quantity, or number"); *Webster's New Universal* at 83. Thus, Congress required that, in order to constitute a crime, the gift be motivated by "one or some" "official act" either already completed or to be performed in the future by the recipient. In order for the statute's specific intent requirement to make any sense, the defendant must have had in mind, at the time he acted, the official act or acts "for or because of" which he gave the gift. It is not enough, as both the Independent Counsel, see Pet. Br. at 19, 22 and the Solicitor General, see S.G. Br. at 12, 20, contend, for the defendant merely to have intended to create a "reservoir of goodwill" which might, at some unknown time in the future, redound to his benefit in some as-yet unknown matter. See *United States* v. *Jennings*, 160 F.3d 1006, 1020 n.5 (4th Cir. 1998) ("[G]oodwill gifts" – "given with no more than some generalized hope or expectation of ultimate benefit" – "are neither bribes nor gratuities." (internal quotation

marks and citations omitted)); *United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). Under the statute's plain language, in order to be guilty of a crime – as distinguished from causing a violation of one of the numerous ethical regulations governing gifts to public officials – the defendant must act with the specific intent to influence or at least reward "one or some" "official act." See *supra* at 4-11.[10]

The Solicitor General's theory would dispense with § 201(c)(1)(A)'s specific intent requirement by relieving the government of the burden of even identifying an "official act" allegedly motivating the gift. Instead, the Solicitor General would require the government to show nothing more than that the defendant gave a gift to a public official who had the authority to act in matters affecting the defendant's interests. See S.G. Br. at 24. In particular, this theory would *not* require the government to show that the defendant knew or foresaw that any identifiable matter affecting his interests was either pending or would come before the recipient official. If accepted, this theory would vastly extend the reach of the federal gratuity statute. Indeed, under this theory, a jury could convict the following individuals of having given

---

[10] In any event, as the Solicitor General's failure to offer any textual support for his reading of § 201(c)(1)(A) suggests, *see* S.G. Br. at 15-19, construing "any official act" to mean "capacity to exercise governmental power" is – if not erroneous – hardly compelled by the language of the statute. Under the rule of lenity, the criminal prohibition of § 201(c)(1)(A) must accordingly be limited to gifts actually motivated by an "official act" either already completed or to be performed in the future by the recipient. *See supra* at 10-11.

an illegal gratuity, and its guilty verdict could not be set aside by any court, see *id.*:

- A lawyer who treats an old friend who has been appointed to the court of appeals to a baseball game. See Pet. App. at 10 & n.4.
- Elementary school students who give the visiting Secretary of Education a jacket emblazoned with their school colors.
- An admiring senior citizen who sends a hand-knitted sweater or a box of brownies to her Senator, who sits on the Senate Finance Committee's Subcommittee on Social Security and Family Policy.

Under the Solicitor General's theory, in each of these cases, "a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, [and] the jury . . . *based on that relationship alone*," S.G. Br. at 24, is entitled to convict. Proof of facts from which a jury could infer that the gift was motivated by "one or some" "official act" – *e.g.*, proof that the lawyer in the first hypothetical actually had or anticipated bringing a case before the court of appeals – would not be required.

Whether the government must prove – circumstantially or otherwise – that a gift was given "for or because of" an identified "official act" or may take the easier routes of proving that it (i) was motivated by the recipient's official "position" or (ii) was merely given to an official who had authority to act on matters affecting the donor's interests is *not* a matter of legal "hair-splitting," Pet. Br. at 41. On the contrary, the question presented by this case is one with enormous legal – and practical –

consequences. The "status" gratuity theory advocated by the Independent Counsel operates to relieve the government of the burden of proving beyond a reasonable doubt that the defendant acted with the statutorily-specified corrupt intent – *i.e.*, "for or because of any official act." The broader theory advocated by the Solicitor General would effectively relieve the government of proving that the defendant acted with any intent at all. Instead, the government need only show that the defendant *might* have had some interest in some matter that *might* come before the official at some time in the future, and then rely on a presumption that where the proscribed intent *might* logically have existed, it actually did. At bottom, both the Independent Counsel's and the Solicitor General's theories attempt to substitute a different intent requirement for that adopted by Congress. If accepted, these theories would dramatically broaden the parameters of the gratuity statute and criminalize far more conduct than the language of the statute actually encompasses. Accordingly, they should both be rejected.

III. GIFTS MOTIVATED BY A PUBLIC OFFICIAL'S POSITION OR CAPACITY TO PERFORM OFFICIAL ACTS ARE PROHIBITED UNDER EXISTING RULES AND REGULATIONS.

The interpretations of § 201(c) urged by the Independent Counsel and the Solicitor General would virtually nullify the detailed rules and regulations which currently govern the acceptance of gifts by public officials. Indeed, if their arguments were to be accepted, § 201(c) would entirely supplant the comprehensive and finely-tuned

ethical standards that already control the conduct of federal officials and impose instead a flat felony prohibition on gifts either motivated by the recipient's "position" or given by a regulated entity to a regulator.

1. The Office of Government Ethics ("OGE") has prescribed detailed regulations governing the circumstances under which Executive-Branch employees may accept gifts. Unlike § 201(c), these regulations expressly prohibit both gifts motivated by the recipient's "official position" and gifts to a public official from a "prohibited source." For example:

> Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:
>
> (1) From a prohibited source; or
>
> (2) Given because of the employee's official position.

5 C.F.R. § 2635.202(a). See also *id.* § 2635.203(d) (defining "prohibited source" as, *inter alia*, a donor "ha[ving] interests that may be substantially affected by performance or nonperformance of the employee's official duties" or are otherwise directly regulated by that employee); *id.* § 2635.203(e) (defining when a gift is given "because of the employee's official position"). This regulatory scheme carefully explains that a gift is given because of the recipient's "official position" when it "would not have been solicited, offered, or given had the employee not held his position as a Federal employee," *id.* § 2635.203(e), a definition virtually identical to that offered by the Independent Counsel.

Unlike § 201(c)(1)(A), however, the OGE regulations go on to delineate specific categories of exceptions to this general prohibition which carefully balance the broad goal of maintaining the integrity of the Federal Government against the realities of holding public office. See 5 C.F.R. § 2635.204. For example, the regulations exclude the following: gifts worth $20 or less, *id.* § 2635.204(a); gifts based upon personal relationships, *id.* § 2635.204(b); and gifts of food and refreshments provided at speaking engagements, *id.* § 2635.204(g)(1), (g)(4); as well as nine other specifically defined categories of gifts, see *id.* § 2635.204(c)-(*l*). In recognition of the special responsibilities of their offices, the OGE regulations even provide an exemption for the President and Vice-President against the general ban on gifts motivated by the recipient's "official position" or given by a "prohibited source," see *id.* § 2635.204(j), thus excepting them from administrative sanction for accepting, for example, a donation of a Thanksgiving turkey, even when matters of farm policy are pending before them. The Independent Counsel's and the Solicitor General's interpretations of § 201(c)(1)(A) would render this carefully calibrated regulatory scheme – which is enforced through a variety of administrative and disciplinary remedies, see 5 C.F.R. §§ 2635.106, 2638.501 – a functional nullity, replacing it with a flat felony prohibition without even a *de minimis* exception.[11]

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[11] In 1997, the Independent Counsel brought an indictment against one individual under the anti-gratuity provision of the Federal Meat Inspection Act, 21 U.S.C. § 622, for, *inter alia*, giving a $13 basketball ticket to a public official. *See United States* v. *Williams*, Cr. No. 96-314 (JR) (D.D.C.) (Sept. 30, 1997) (superseding indictment).

The OGE's regulations also clearly indicate that they were understood to reach far further than the criminal prohibitions of § 201(c). The regulations specifically state:

> (b) *Relationship to illegal gratuities statute.*
>
> Unless accepted in violation of paragraph (c)(1) of this section [prohibiting the "accept[ance of] a gift in return for being influenced in the performance of an official act"], a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

5 C.F.R. § 2635.202(b).[12] The clear implication of this section is that the gratuity statute was not understood by the OGE to place an automatic blanket prohibition on all gifts given because of the recipient's "position" or given by a "prohibited source."

2. The United States Congress has adopted similarly detailed, and suitably customized, ethical rules governing the acceptance of gifts by its members, officers, and employees. See H.R. Rule LII(1)(a) ("No Member, officer,

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[12] The Office of Government Ethics specifically explained:

> "Section 2635.202(b), as drafted, explains the relationship between the standards set forth in proposed subpart B and 18 U.S.C. 201(c)(1)(B). . . . [T]he language of § 2635.202(b) reflects congressional intent that the acceptance of a gift in accordance with the exceptions and other standards set forth in subpart B will not subject an employee to prosecution for violation of the illegal gratuities statute."

Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33780 (1991).

or employee of the House of Representatives shall knowingly accept a gift except as provided in this rule."); S. Rule XXXV(1)(a)(1) ("No Member, officer, or employee of the Senate shall knowingly accept a gift except as provided in this rule."). Like the OGE regulations, these rules have a clear *de minimis* exception, expressly permitting the acceptance of gifts worth less than $50. See H.R. Res. 9, 106th Cong., 1st Sess. (1999) (enacted); S. Rule XXXV(1)(a)(2). Like the OGE regulations, the House and Senate gift rules also contain a wide variety of finely-crafted exceptions which take into account, *inter alia*, the necessary interaction between members of the public and their elected representatives. See H.R. Rule LII(1)(c); S. Rule XXXV(1)(c).

3. The Federal Judiciary is also subject to stringent rules governing the acceptance of gifts. The Code of Conduct for United States Judges stresses the importance of the integrity and independence of the federal judiciary, and instructs judges to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Code of Conduct for United States Judges, Canon 5. The Code of Conduct further instructs judges and members of their families not to accept *any* gift unless it falls in one of eight specified categories. See *id.* at Canon 5C(4). One of those categories, however, specifically permits a judge to accept certain gifts that are obviously motivated by the judge's "position." For example, judges may freely accept "gift[s] incident to a public testimonial"; gifts of "books, tapes and other resource materials supplied by publishers on a complimentary basis for official use"; and "invitation[s] to . . . bar-related function[s] or . . . activit[ies] devoted to the improvement of the law, the legal system,

or the administration of justice." *Id.* at Canon 5C(4)(a). Moreover, unlike § 201(c) as interpreted by the Solicitor General, the Code of Conduct permits judges – who have the *authority* to act in matters affecting almost everyone's interests – to accept gifts so long as the donor "is not a party or other person who *has* come or is *likely* to come before the judge or whose interests may be substantially affected by the performance or non-performance of his or her official duties." *Id.* at Canon 5C(4)(h)(ii) (emphasis added).

The interpretations of § 201(c)(1)(A) urged by the Independent Counsel and the Solicitor General would sweep aside these finely-nuanced rules and regulations and subject not just public officials, lobbyists, and regulated entities, but also ordinary citizens who come into contact with public officials, to severe criminal sanctions for ordinary acts that Congress determined were best combated through non-criminal remedies. See *supra* at 10-14. Under the Independent Counsel's and Solicitor General's theories, it would be a felony for any appreciative constituent to give anything to a Member of Congress or the President – before whom everyone always has some matter of interest. Their interpretations of § 201(c) accordingly would not only upset the carefully tailored balance struck by the existing gift rules, but also threaten to trivialize the criminal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMERICAN LEAGUE OF LOBBYISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. "For or Because of Any Official Act Performed or To Be Performed" Means What It Says..... 6

A. The Plain Language of the Mens Rea Element Requires That the Gift Be Motivated by an Official Act Actually Contemplated by the Donor..... 8

B. The "Official Act" Interpretation Makes Sense in the Context of the Statute 14

1. The "Official Act" Interpretation Separates Bribery and Gratuity Offenses 15

2. The "Official Act" Interpretation Gives Effect to Congressional Intent 16

3. Congress is the Proper Body to Remedy Any Legislative Gaps 18

II. Even if the Statute Were Ambiguous, Neither the "Official Position" nor the "Capacity" Interpretation is Consistent with the Applicable Interpretive Rules 19

A. Statutes Must Be Interpreted So As To Implement Congressional Decisions Regarding Criminal Liability and To Provide Adequate Notice of Criminal Conduct 19

TABLE OF CONTENTS – Continued

Page

B. Statutes Must Be Construed To Avoid Constitutional Conflicts Unless Clear Congressional Intent to the Contrary Exists 21

1. Lobbying Implicates First Amendment Rights 21

2. Statutes Must Be Construed Where Possible to Avoid the Unintended Infringement of First Amendment Rights..... 25

C. No Congressional Intent Supports a Statutory Interpretation Expanding Criminal Liability Beyond that Provided by the Plain Language of the Statute 27

1. Statutory Text 27

2. Legislative History..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316 (5th Cir. 1994)..... 23

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)..... 18, 22, 23, 26

Connecticut Nat'l Bank v. Germaine, 503 U.S. 249 (1992)..... 7

Darby v. Cisneros, 509 U.S. 137 (1993) 7

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... *passim*

Fair Political Practices Comm'n v. Superior Court of Los Angeles County, 599 P.2d 46 (Cal. 1979)..... 24

Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987)..... 29

K mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 7

Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1967) 23

Liparota v. United States, 471 U.S. 419 (1985).....18, 20

Maryland Right to Life State PAC v. Weathersbee, 975 F. Supp. 791 (D. Md. 1997) 23

Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973)..23, 24

Morissette v. United States, 342 U.S. 246 (1952)..... 20

Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. Partnership, 507 U.S. 380 (1993) 7, 8

Regan v. Taxation With Representation, 461 U.S. 540 (1983)..... 23

Rubin v. U.S., 449 U.S. 424 (1981)..... 7

TABLE OF AUTHORITIES – Continued

Page

TVA v. Hill, 437 U.S. 153 (1978) 18

United States v. Bass, 404 U.S. 336 (1971) 19, 20

United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988) 16

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 15, 16

United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) 15

United States v. Harriss, 347 U.S. 612 (1954)..... *passim*

United States v. Jackson, 72 F.3d 1379 (9th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996)..... 23, 24, 25

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998) 15, 16

United States v. Menasche, 348 U.S. 528 (1955)..... 8, 14

United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989) ..... *passim*

United States v. Patel, 32 F.3d 340 (8th Cir. 1994)..... 15

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 7

United States v. Rumely, 345 U.S. 41 (1953) 21, 26

United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) ..23, 24

United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998)..... 10

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 17, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 7353 .....6, 17

18 U.S.C. § 201(a)(3) 8

18 U.S.C. § 201(c)(1)(A) 8

18 U.S.C. § 207(c) 26

18 U.S.C. § 213 27

28 U.S.C. § 455(a) 13

LEGISLATIVE AND REGULATORY MATERIALS

5 C.F.R. § 2635.101, *et seq* 6, 17

5 C.F.R. § 2635.202(a) 17

5 C.F.R. § 2635.204(a), (b), (d), (g) (*as amended in* 63 Fed. Reg. 69,992 (1998)) 18

H.R. Rule XXVI (amended Jan. 6, 1998) (previously H.R. Rule LI)..... 6, 17, 18

S. Rule XXXV(1)(a), (c), *et seq.* (amended July 18, 1995) 6, 17, 18

S. Rep. No. 2213, 87th Cong., 2d Sess. 19 (1962), reprinted in 1962 U.S.C.A.A.N. 3852 29

Conflicts of Interest: Hearing Before the Committee on the Senate Judiciary, 87th Cong., 2nd Sess., 25-26 (Comm. Print 1962)..... 17

Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary, 86th Cong., 2d Sess., Federal Conflict of Interest Legislation 87-88 (Comm. Print 1960) 28

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

Code of Conduct for United States Judges
Canon 5(C)(4) 6, 18

BRIEF OF AMERICAN LEAGUE OF LOBBYISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American League of Lobbyists ("ALL") files this *amicus* brief in support of respondent, Sun-Diamond Growers of California, pursuant to this Court's Rule 37.3(a).* ALL also appeared as *amicus* in support of Sun-Diamond Growers of California in the proceedings below before the D.C. Circuit. Both petitioner and respondent have consented to the filing of this *amicus* brief, and letters of consent have been filed with the Clerk of this Court. Sup. Ct. R. 37.3.

INTEREST OF AMICUS

The American League of Lobbyists is a national association of more than 500 government relations and public affairs professionals and includes a wide cross-section of individuals, law and lobbying firms, small and large businesses, and nonprofit organizations. ALL works in a variety of ways to support and advance the interests of its members through education, outreach, and advocacy programs. Its members have associated to protect the ability of lobbyists to pursue their vocation and effectively to represent the interests of their clients, employers, and constituents before government entities.

ALL has adopted Guidelines for Professional Conduct governing its members and encourages the implementation and advancement of ethical lobbying practices. ALL worked hard to reform and strengthen federal lobbying disclosure laws and supports vigorous enforcement of laws designed to eliminate corrupt practices. Its

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* Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *amicus* ALL, made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

speakers' bureau sends lobbyists to talk about the profession with elementary school classes and foreign visitors. In sum, ALL members are proud of their profession and fully support the gratuity statute's goal of criminalizing corrupt practices that may on occasion infect that profession.

The Independent Counsel's interpretation of the gratuity statute, in ALL's view, poses an unintended, unnecessary, and unwise burden on the exercise by American citizens and their advocates of constitutionally protected rights. Lobbying – which is but the modern embodiment of the right to petition recognized as early as the *Magna Carta* – has long been seen as a constituent of the panoply of First Amendment rights to engage in political speech, to petition the government for redress of grievances, and of association. To risk chilling or impeding these constitutional rights through imposition of criminal sanctions calls for great caution, for it risks undermining a fundamental safeguard of democracy: The individual's right to seek to influence government.

It is critically important to citizens and the lobbyists who represent them that the gratuity statute's bright-line rule regarding intent be given the full force intended by Congress. Otherwise, those interacting with congressional and executive branch officials (and judges) may not readily be able to determine whether their actions constitute the legitimate exercise of protected First Amendment rights – or criminal behavior. If the statute's carefully worded intent requirement is not given effect, normal social interaction and benign personal relationships between lobbyists and federal officials will fall under the specter of criminal prosecution.

Members of the American League of Lobbyists and their clients, employers, and constituents interact with government officials each day. ALL is confident that, in

enacting the gratuity statute, Congress meant what it said and did not intend to criminalize a broad range of gift-related conduct without regard to any dangers that may or may not be presented. The isolation of government officials from the citizens they interact with or represent is not a result intended by Congress. Implementing the plain language of this law consistent with the historic system of criminalizing gifts given with corrupt intent, while reserving control over the appearance of impropriety associated with benign gifts to civil and administrative regulation, furthers congressional intent and minimizes any potential for chilling the exercise of First Amendment rights.

SUMMARY OF THE ARGUMENT

The gratuity statute imposes criminal liability only upon those who provide something of value to a covered official "for or because of any official act performed or to be performed." The question before this Court is whether this phrase means what it says or, instead, whether it should be interpreted to mean "for or because of an official's position" (the Independent Counsel's argument) or "for or because of an official's capacity to act" (the Department of Justice's position). These alternatives plainly would dilute the intent or mens rea requirement of the statute. They would eviscerate Congress' bright-line rule that separates innocent from criminal conduct, replacing the statute's focus on a specific link in the donor's mind between the gift and an official act with an ephemeral requirement that the gift only be to an official in a position to benefit the donor in some way in the future. The alternative readings of the gratuity statute that diminish its intent requirement conflict with the plain language of the act.

The existing statutory and regulatory schemes recognize three tiers of gift-giving and deal appropriately with issues presented by each type of conduct. Bribery, as a direct assault on the integrity of the political system, carries heavy criminal penalties. Gratuities given for or because of an official act, although not as serious as bribery, may have similar corrupting influences on government and, thus, also trigger significant penalties. Gratuities not motivated by "a specific official action performed or to be performed" – ones that are not inevitably nefarious – do not merit criminal sanctions and may even be beneficial. As recognized by Congress, this conduct is best controlled by the flexibility of regulation. Thus, a balanced scheme for addressing the giving of gifts to officials has been established; any shift in that balance should remain the province of Congress.

The "position" or "capacity" interpretations of the gratuity statute also violate important rules of statutory construction. First, statutes must be interpreted, where possible, to avoid infringing First Amendment rights in the absence of clear congressional intent to the contrary. Lobbying has repeatedly been recognized as implicating First Amendment rights of association, free speech, and petition. Imposing criminal liability for gifts made to officials who may have the authority to affect the donor's interests at some indefinite time in the future would criminalize many normal social interactions between citizens and their representatives. Obstruction of these contacts would chill the exercise of First Amendment rights while hampering the government's ability to function effectively. The ability of lobbyists to develop and maintain legitimate relationships with government officials – which effectuate the citizen's right to petition, facilitate the flow of information, and inform decisionmaking –

would be severely and unnecessarily hindered by the fear of criminal prosecution.

Moreover, an attack on the statute's mens rea requirement directly conflicts with the interpretative presumptions favoring criminal defendants. Where a criminal statute is ambiguous or silent on that element, mens rea is to be presumed absent a clear congressional intent to the contrary. Where, as here, the statute explicitly imposes a mens rea requirement, it must be given full effect. Otherwise the statute would treat innocuous conduct as criminal, shocking the average person and depriving potential criminal defendants of notice of what is being sanctioned. Imprecise standards for criminal liability are disfavored as a general matter, more so where the conduct condemned is associated with the protected rights of speech, association, and petition.

The legislative history of the gratuity statute does not point to a contrary conclusion. Congress intended no conflict between the gratuity statute and either First Amendment rights or rights of criminal defendants. Accordingly, the Court should give full effect to the plain statutory language requiring that a gift deemed unlawful have been provided "for or because of any official act."

ARGUMENT

Congress clearly expressed through plain statutory language its intent to limit criminal liability to those who directly endanger the health of the political system by engaging in bribery or the lesser offense of providing a thing of value to a public official "for or because of any official action performed or to be performed." Congress chose not to criminalize conduct falling outside these two categories although it easily could have (and did in other statutes). Instead, it has ceded to each branch of government the delicate task of

separating acceptable and beneficial social conduct from conduct that might present an indirect danger or appearance of corruption. *See* 5 U.S.C. § 7353. All three branches have adopted comprehensive and finely tuned noncriminal regulations governing the receipt of gifts by their members. *See* 5 C.F.R. § 2635.101, *et seq.*; H.R. Rule XXVI (amended Jan. 6, 1998) (previously H.R. Rule LI); S. Rule XXXV(1)(a), (c) (amended July 18, 1995); Code of Conduct for United States Judges Canon 5(C)(4).

Any interpretation of the gratuity statute indiscriminately criminalizing gift-giving motivated even partially by an official's mere capacity to affect the potential interests of the donor would introduce chaos into a well-ordered regulatory and statutory scheme. Such an interpretation would (1) blur the bright-line rule regarding the imposition of criminal liability established by the plain statutory language and (2) transform the administrative regulations governing gifts from a source of guidance regarding permissible conduct into a source of confusion by criminalizing conduct expressly permitted by those rules. The specter of criminal prosecution for an inadvertent step over an amorphous line between criminal and innocent conduct will severely chill normal social interactions between citizens and government officials. This enforced isolation of government officials from the individuals they represent will impinge upon the effective exercise of the First Amendment rights of association, speech, and petition and will hamper the effective functioning of our representative government.

I. "For or Because of Any Official Act Performed or To Be Performed" Means What It Says.

The question presented is whether the apparently clear phrase "for or because of any official act performed

or to be performed" can be construed to mean "for or because of an official's position" or "for or because of an official's capacity to act." The first step in statutory analysis is, of course, to look to the language of the statute. "If the statute is clear and unambiguous that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (internal quotation omitted); *Rubin v. U.S.*, 449 U.S. 424, 430 (1981). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.* (internal citations omitted). Absent evidence to the contrary, courts should presume that Congress intends the common meanings of the statutory terms to apply. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. Partnership*, 507 U.S. 380, 388 (1993). Generally, Courts do not go beyond the statute's language unless that language is ambiguous or produces absurd results. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Here, the Court need not go beyond the first step. Congress meant what it said: Only one who provides a thing of value to a covered official "for or because of any official act performed or to be performed" violates the gratuity statute. *See Connecticut Nat'l Bank v. Germaine*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . [W]hen the words of a statute are unambiguous . . . judicial inquiry is complete.") (internal quotation omitted).

A. The Plain Language of the Mens Rea Element Requires that the Gift Be Motivated by an Official Act Actually Contemplated by the Donor.

The gratuity statute provides that "whoever otherwise than as provided by law for the proper discharge of official duty directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official" violates the statute. 18 U.S.C. § 201(c)(1)(A) (emphasis added). An "official act" is defined as "any decision or action upon any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The natural reading of this provision is that one who provides anything of value "for or because" of a "decision or action" "performed or to be performed" at any time by a person acting in his official capacity violates the gratuity statute. In other words, the statute would impose criminal liability on any donor who gave a thing of value to a covered official for or because of a specific act (or acts) either already performed or that the donor hoped would be performed by the official in the future. The words chosen by Congress to define "official act" and the modifying phrase "performed or to be performed" are not terms of art. Accordingly, the Court should interpret those words according to their common meanings. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 388. This reading gives effect to all the words defining the mens rea requirement and the underlying definition of "official act" without eliminating or substituting any words. *See United States v.*

Menasche, 348 U.S. 528, 538-39 (1955) (Statutes must be interpreted "to give effect, if possible, to every clause and word.") (internal quotation omitted).

The same cannot be said for the Independent Counsel's interpretation of this language. He argues that "for or because of any official act performed or to be performed" really means "for or because of an official's position" when the donee has actual or potential authority over the donor. *See* Pet. Br. at 15-17. According to the Independent Counsel, the only donative intent that is required to violate the gratuity statute is that the donor be motivated in some degree by the official's position. The jury instructions proposed by the Independent Counsel and used by the District Court adopted this "official position" interpretation. For example, the Court instructed the jury that:

> The gratuity statute makes it a crime for a person or company to knowingly and willfully give a public official a thing of value *because of his official position whether or not the giver or receiver intended that particular official's acts be influenced.* Pet. App. 84 (emphasis added).
>
> [T]he government must prove that the gratuity was knowingly and willingly given for or because of an *official act performed or to be performed* by the Secretary of Agriculture, Michael Espy. That *means* that the government must prove that [respondent] . . . knowingly and willingly gave the gratuities, *at least in part, because of the Secretary's position in appreciation of [respondent's] relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.* Pet. App. 87 (emphasis added).
>
> *The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or to any act at all.* In other words, the

> government need not prove that the gratuity was given as a quid pro quo, that is, in exchange for any one specific action performed or to be performed by the Secretary. Pet. App. 87 (emphasis added).

As noted by the D.C. Circuit and Solicitor General, under that interpretation the donor need not intend that the official exercise his power at all. *See United States v. Sun-Diamond Growers*, 138 F.3d 961, 968 (D.C. Cir. 1998); DOJ Brief at 14-19. By substituting "official position" for "any official act performed or to be performed," the Independent Counsel eliminates the requirement that the donor intend that an "official action" be performed by the donee, thereby dramatically diluting the statutory mens rea factor.

The following individuals would be guilty of a gratuity violation under this expansive interpretation: (1) an individual taking a friend out to dinner to celebrate the friend's new promotion as an IRS agent; (2) an employee of the Smithsonian who invites the Director of the National Endowment of the Arts to a fundraiser as a draw for guests; (3) a Sunday morning talk show host who takes the Director of the FBI to a public lunch to impress potential guests. Even if these individuals could prove that they were totally indifferent to the manner in which the official exercised his authority, they would be guilty under the "official position" interpretation of the gratuity statute because they were within the potential authority of the donees and the gifts were motivated by the donees' official positions. *See* DOJ Br. at 13 (noting that the "official position" interpretation would erroneously subject such conduct to criminal liability).

Although recognizing that the preceding interpretation is flawed because it eviscerates the statutorily required link between donative intent and the exercise of official power, the Department of Justice formulation of

the donative intent required to trigger criminal liability is so attenuated as to be almost meaningless. It contends that this required link between donative intent and an "official act" is satisfied so long as the donor's gift is motivated *in any degree* by a realization that the donee official may at some time in the future exercise his authority to benefit the donor in some undefined way. *See* DOJ Br. at 18 (a gift motivated "at least in part" by official capacity is a gratuity). The Department of Justice states: "It is sufficient to show that the gift was motivated by the recipient's perceived *capacity* to assist the donor through the exercise of his official power or influence, *even if the particular acts that might affect the donor's interests are neither specified nor even known at the time of the gift.*" *Id.* at 17 (internal quotation marks omitted) (emphasis added). This conclusion represents a long interpretative journey from the statute's straightforward and clear mens re requirement that a gift be given "for or because of any official act performed or to be performed."

Conduct that could trigger criminal proceedings under this interpretation includes: (1) a lawyer's financial contribution for a portrait of an admired judge even when that lawyer has no matters pending or knowledge of matters that will be pending before the judge; (2) a box of brownies given by a supportive elderly constituent to her Congressman; (3) a friend's Christmas present to the IRS Commissioner even where that person has no reason to believe that he is being or will be audited; and (4) a lobbyist who takes a government official out to lunch when he has no matters currently pending or that he knows will be pending before the official.

These individuals, if indicted, could assert the difficult-to-prove defense that the act was motivated "solely" by legitimate reasons, such as friendship, without any tinge of an improper intent. This standard, however,

ignores the practical reality that human conduct is seldom the product of unitary motivation. It is the rare person indeed who does not even fleetingly consider the possible benefits accruing from the maintenance of a good relationship with persons in positions of authority.

A standard requiring criminal defendants to establish that their actions are *solely* motivated by reasons divorced from the official's capacity to affect their interests every time they interact socially with government officials is simply unworkable. The resulting isolation of public officials from the citizens they represent and from the community in which they reside would be particularly severe for those officials with broad authority such as judges, law enforcement officials, federal benefit program employees, and others. By inserting a barrier between citizens and government officials, the "position" and "capacity" interpretations' threat of criminal liability would undoubtedly affect the exercise of the First Amendment rights of association, speech, and petition. In sum, rather than advancing the statutory goal of ensuring a healthy representative government, a broad reading of the intent statute will simply cut the strands of social interaction that bind the individuals who serve in the government to the community they represent. The tension between the real-world needs of government officials to be involved in and knowledgeable about the communities they regulate and govern and the need to protect the government from corrupting influences is resolved by a well-coordinated system of criminal liability and noncriminal regulation. While a federal employee may be subject to criminal penalty if she violates the plain language of the statute, more precise control of the noncriminal receipt of gifts is exercised through regulation.

Unlike the position and capacity interpretations, the statute's intent element establishes a clearly demarcated line between conduct that will and will not trigger criminal liability. Accordingly, an individual may – without fear of criminal prosecution – engage in normal social interactions with a government official within whose potential authority he may be, but before whom he has no current or known future matter. For instance, an attorney who has a social relationship with a judge need not worry that giving the judge a Christmas gift may trigger criminal prosecution merely because the potential exists that he may at some unknown time appear in that judge's court. In such situations, the donor would be certain that his conduct will not subject him to criminal liability. This is not to say, however, that an adversary may not file a motion to recuse that judge based upon a possible appearance of a conflict of interest created by the gift. *See* 28 U.S.C. § 455(a).

In the much smaller number of situations where a donor has a matter pending or knows of a specific matter that will be pending before an official, the statutory language puts him on notice that his intent in giving a gift to the official may become a jury question. In light of that knowledge, he can evaluate whether to make the gift. For instance, the law-school friend who has shared his season tickets to the Redskins with a judge since long before the judge assumed the bench may well decide not to change that practice when he has a matter before that judge, since he almost certainly could convince a jury that the gift was motivated by friendship rather than by an official act. However, a lawyer who has no such long-standing friendship with a judge actually presiding or who would be presiding over a specific matter involving that lawyer might decide against making such a gift because of the difficulty of convincing a jury that his intent was

innocent. Regardless whether the lawyer decided to engage in the activity, he would be able to make that decision with clear knowledge of the risk presented by the gift-giving.

The plain language interpretation of the mens rea requirement thus has two beneficial results. First, it gives effect to substantive limitations placed upon the scope of conduct subjected to criminal liability by Congress. In other words, it defers to the congressional determination of what conduct is best controlled by and merits criminal sanctions. Second, it provides clear notice to potential criminal defendants of the conduct that may subject them to criminal penalties. This permits individuals to maintain relatively normal social relationships with government officials while prohibiting the core conduct at which the statute is aimed.

B. The "Official Act" Interpretation Makes Sense in the Context of the Statute.

Furthermore, this interpretation gives effect to all parts of the statute by distinguishing between the offenses of bribery and illegal gratuities. *See Menasche*, 348 U.S. at 538-39. In addition, it gives effect to Congress' apparent decision to impose criminal liability for a relatively narrow category of serious behavior and to permit branch-by-branch regulation of less dangerous or even beneficial gift-related conduct. Thus, rather than representing an unintended gap in coverage of dangerous activity, this interpretation complements congressionally sanctioned regulatory schemes governing the receipt of gifts. Furthermore, even if such a gap in legislative coverage exists, it is the role of the legislature rather than the judiciary to fill it.

1. The "Official Act" Interpretation Separates Bribery and Gratuity Offenses.

The bribery provision subjects to criminal liability donors who give a gift in exchange for an official act. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("[T]he payor of a bribe must intend to engage in some more or less specific quid pro quo with the official who receives the payment."); *United States v. Bustamante*, 45 F.3d 933, 938 (5th Cir. 1995) (bribery requires that a thing of value be given *in return* for the performance of an official act) (emphasis added). In that instance, the donor not only intends to influence the official, but the giving of the gift is dependent upon his belief that he has succeeded in influencing that official. *See United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974) (a bribery offense requires that the gift and official act motivate each other in contrast to the gratuity statute where the donor's gift, although *motivated by* the official act, need not itself motivate or affect the official act).

The gratuity provision, however, imposes liability on those who give a gift with the intent to reward an official for a specific official act performed or that they hope will be performed in the future. *See, e.g., Jennings*, 160 F.3d at 1013 ("[a]n illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event."); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (requiring that donor be motivated by a concrete "official act."). The difference between a bribe and a forward-looking gratuity is that the person giving the gratuity – as opposed to the bribe – does so without any implicit or explicit agreement that the official will take the hoped-for action in return for the gift. *See Brewster*, 506 F.2d at 72 (Unlike bribery, the gratuity and the official act need not motivate

each other.). In other words, in contrast to a bribery case, the donor's action is independent of the donee's intent. *See id.* at 72. Thus, the forward-looking gratuity is a separate and less serious offense than bribery because it does not require the corruption of a government official. *See Jennings*, 160 F.3d at 1014 ("Payment of an illegal gratuity is a lesser included offense of bribery. . . . because corrupt intent is a different and higher degree of criminal intent than that necessary for an illegal gratuity.") (internal quotation omitted); *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988) ("We think it undoubtedly true that a corrupt payment intended to influence an official act is more serious than a payment merely 'for or because of' an official act without proof of corruption, and the penalties provided by Congress reflect such an assessment.") (citation omitted); *Brewster*, 506 F.2d at 72 ("[T]he briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.").

2. The "Official Act" Interpretation Gives Effect to Congressional Intent.

The Independent Counsel and Department of Justice contend that Congress could not have actually intended for the statute to cover only gifts made for or because of specific official acts because such an interpretation would not criminalize all conduct at odds with the statutory objective of assuring the undivided loyalty of employees to the government. *See* Pet. Br. at 38-42; DOJ Br. at 19-22. The Independent Counsel and Department of Justice attempt to remedy this perceived gap or flaw in the legislation by broadly interpreting the intent element. This approach cannot be condoned for two reasons. First, there is no reason to believe that a "gap" in coverage

exists. Congress may well have believed that ethical regulation of government officials would provide sufficient protection for the attenuated harms resulting from an attempt to obtain favorable treatment for undefined potential acts. *See* 5 U.S.C. § 7353; 5 C.F.R. § 2635.101, *et seq.*; 5 C.F.R. § 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); H.R. Rule XXVI (amended Jan. 6, 1998); S. Rule XXXV(1)(a), (c) (amended July 18, 1995). *See also* Conflicts of Interest: Hearing Before the Committee on the Senate Judiciary, 87th Cong., 2nd Sess., 25-26 (Comm. Print 1962) (Letter from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Committee dated July 23, 1962) (stating that a proposed amendment to the gratuity statute by Senator Keating that would have criminalized the receipt by government officials of gifts made because of their official positions was unnecessary in light of administrative regulations governing that conduct).

Such a cautious approach by Congress would make sense because much of the conduct brought within the scope of the statute by the Independent Counsel's and Department of Justice's interpretation of the statute is not "inherently" dangerous and would thus not alert average citizens that this conduct would render them subject to criminal liability. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441-42 (1978); *United States v. Nofziger*, 878 F.2d 442, 453-54 (D.C. Cir. 1989). In contrast, the government officials and employees to whom the regulations apply are much more likely to be aware of the adverse consequences of receiving an improper gift than the person making the gift. For instance, while it may not occur to a college administrator who – at an educational seminar – gives the Secretary of Education a school baseball cap that such conduct may constitute a gratuity under the "position" or "capacity" interpretations, the

Secretary is likely to be aware of whether ethical regulations permit him to accept it.

In addition, Congress may have concluded that those regulations – which are detailed and comprehensive – would provide a more finely tuned method of implementing the proper balance between any potential for harm caused by conduct having only an attenuated connection to official acts and recognition that government officials are members of society who interact with other members of the community. For instance, although the Office of Government Ethics has expressly prohibited status gratuities, this bar is subject to numerous exceptions, including: (1) gifts of $20 dollars or less; (2) gifts based upon a personal relationship; (3) awards and honorary degrees; and (4) gifts of refreshments at speaking engagements and other functions 5 C.F.R. § 2635.204(a), (b), (d), (g) (*as amended in* 63 Fed. Reg. 69,992 (1998)). The rules promulgated by the legislative and judicial branches also make careful distinctions between gifts that may be accepted and those that may not. *See* H.R. Rule XXVI; S. Rule XXXV(1)(a), (c); Code of Conduct for United States Judges Canon 5(C)(4). It would be odd indeed if gifts which government officials could accept within the ethical rules of their branch would subject the donor to felonious criminal liability.

3. Congress is the Proper Body to Remedy Any Legislative Gaps.

Finally, even if a gap exists, it is the role of Congress and not the judiciary to fill it. *See TVA v. Hill*, 437 U.S. 153, 194 (1978). This is especially true when an expansive statutory interpretation would implicate constitutional rights or impose criminal liability without the clear intent of Congress. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Liparota v. United States*, 471 U.S. 419, 427 (1985). Accordingly, the Court

should give effect to the language of the statute as written by Congress and hold that only donors who provide a covered official with a thing of value for or because of a specific official act (or acts) are subject to criminal liability under the gratuity statute.

II. Even if the Statute Were Ambiguous, Neither the "Official Position" nor the "Capacity" Interpretation is Consistent with the Applicable Interpretive Rules.

Even were the statutory mens rea requirement ambiguous, however, neither the position nor capacity interpretation should be adopted because they directly conflict with two fundamental precepts of statutory construction: (1) ambiguous criminal statutes must be construed in favor of potential criminal defendants; and (2) statutes, where possible, must be interpreted to avoid the infringement of First Amendment rights. Both the position and capacity interpretations impermissibly expand the scope of conduct subject to criminal sanctions and substantially dilute the statutory mens rea requirement, thus indiscriminately implicating a broad array of First Amendment activity. In the absence of clear congressional intent to the contrary, these results are inappropriate.

A. Statutes Must be Interpreted So As To Implement Congressional Decisions Regarding Criminal Liability and To Provide Adequate Notice of Criminal Conduct.

Several fundamental principles guide the interpretation of criminal statutes. First, "because of the seriousness of criminal penalties and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). In other words, individuals should not

"languish[ ] in prison unless the lawmaker has clearly said they should." *Id.* (internal quotation omitted). Thus, the rule of lenity provides that ambiguous statutory language should be construed in favor of the defendant unless to do so would conflict with the implied or expressed intent of Congress. *Liparota*, 471 U.S. at 427. Obviously, then, statutory limitations on the scope of criminal liability such as the "for or because of any official act performed or to be performed" language should be given full effect. As noted above, the plain language interpretation of the gratuity statute imposes criminal liability for a far smaller class of conduct than the "position" or "capacity" interpretations.

Second, "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed . . . [and] [t]o make the warning fair . . . the line should be clear." *Bass*, 404 U.S. at 348. Consistent with this concern that individuals should not be subject to criminal liability for crossing a criminal boundary they do not know exists or cannot clearly discern, courts should generally presume the existence of a mens rea requirement. *See Liparota*, 471 U.S. at 426. Congress may only depart from the norm of providing a mens rea requirement by affirmatively indicating its intent to do so. *See Morissette v. United States*, 342 U.S. 246, 273 (1952). Accordingly, where statutes have been silent regarding mens rea, the Court "has on a number of occasions read a state-of-mind component into an offense." *United States Gypsum Co.*, 438 U.S. at 437 (requiring the government to establish intent as an element of the crime despite the silence of the Sherman Act) (citations omitted). This presumption in favor of a mens rea requirement is particularly strong where the offense involved is a felony or where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426; *Nofziger*, 878 F.2d at 454 (refusing to treat

a statute chilling lobbying activities protected by the First Amendment as a strict liability statute where Congress had not expressed such an intent). Here, mens rea does not have to be read into the statute. The Court need only give full effect to that element already clearly established by Congress and reject the "position" or "capacity" interpretations that would so dilute it as to render it essentially meaningless.

B. Statutes Must Be Construed To Avoid Constitutional Conflicts Unless Clear Congressional Intent to the Contrary Exists.

1. Lobbying Implicates First Amendment Rights.

This Court has on several occasions indicated that lobbying constitutes political activity triggering First Amendment protections. *See United States v. Rumely*, 345 U.S. 41, 44-48 (1953) (avoiding "grave constitutional" problems created by a conflict "between the Congressional power to investigate" lobbying activities and the "limitation imposed by the First Amendment" by narrowly construing the "lobbying activities" authorized for investigation by congressional resolution.); *United States v. Harriss*, 347 U.S. 612, 620-21, 624-26 (1954) (importing *Rumely*'s narrow definition of lobbying activities to interpret the Federal Regulation of Lobbying Act of 1946 and concluding that the disclosure requirements imposed by the statute – as narrowly construed – did not violate the First Amendment because the slight "informational" burdens imposed on the lobbyists were outweighed by the vital interest of Congress in being able to evaluate the information provided by lobbyists.).

Given the unique relationship between lobbying activities and constitutionally protected rights, the gratuity statute should be interpreted in a fashion that avoids friction with these rights. The strongest indication by this

Court that lobbying is protected by the First Amendment is found in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, the Court concluded that "two or more persons . . . associating together in an attempt to persuade the legislature or the executive to take a particular action with respect to a law" constituted political activity implicating the First Amendment right to petition. *Id.* at 136-138. Emphasizing the importance of the right to petition, the Court stated: "In a representative democracy such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. In the absence of any clear indication that Congress intended to regulate such political activity, the Court refused to "lightly impute to Congress an intent to invade" the First Amendment right to petition (or lobby) the government for redress of grievances. *Id.* at 138.

Quoting the above language from *Noerr*, the Court expanded that case's implicit recognition of the constitutional aspect of lobbying to the administrative arena in *California Motor Transp. Co.*, 404 U.S. at 510-11. The Court concluded that it "would be destructive of the rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures" of the government "to advocate their causes and points of view respecting resolution of their . . . interests" without any clear indication by Congress of an intent to limit such activity. *See id.* at 508-11; *Harriss*, 347 U.S. at 631 (Douglas, J., dissenting) (noting that the lobbying legislation at issue intersected with the "domain of the First Amendment."); *id.* at 634-636 (Jackson, J. dissenting) (concluding that the right to petition implicated by the lobbying statute should be given the same protections as other First Amendment rights and that reaching "the real evils of

lobbying without cutting into the constitutional right of petition is a difficult and delicate task."); *California Motor Transport Co.*, 404 U.S. at 516-17 (Stewart, J., concurring) (*Noerr* concluded that immunity from the antitrust laws "was required in order to preserve the informed operation of the governmental processes and to protect the right of petition guaranteed by the First Amendment."); *see also Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983) (holding that statutory removal of a tax-emption for nonprofit groups who lobbied was constitutional, the Court observed that Congress was not required to subsidize the exercise of constitutional rights.); *id.* at 552 (Blackmun, J., concurring).

Numerous lower courts have explicitly expressed this Court's strongly implied recognition that lobbying is protected by the First Amendment rights to petition and to engage in political speech. *United States v. Sawyer*, 85 F.3d 713, 731 (1st Cir. 1996) (the activities of a professional lobbyist "are protected by the right to petition the Government for redress of grievance guaranteed by the First Amendment of the United States Constitution.") (internal citation omitted); *United States v. Jackson*, 72 F.3d 1379, 1386 (9th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996) (noting the "First Amendment freedoms to lobby and make donations to political causes."); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 326 (5th Cir. 1994) ("Lobbying . . . is activity protected by the First Amendment right of petition . . . [which] guarantees all citizens the right to appeal to the legislature or judiciary and is not conditioned upon motive.") (internal quotation omitted); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("While the term lobbyist has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973); *Maryland Right to Life State PAC v. Weathersbee*, 975

F. Supp. 791, 797 (D. Md. 1997); *Fair Political Practices Comm'n v. Superior Court of Los Angeles County*, 599 P.2d. 46, 53 (Cal. 1979).

The rights guaranteed by the First Amendment – particularly the right to petition – perform a role essential to the proper functioning of a representative government by informing government officials of the desires of the citizens they represent. That individuals or corporations hire others to facilitate their exercise of those rights alters neither the constitutional status of the rights exercised nor the usefulness of the activity. *See Noerr*, 365 U.S. 127 (noting the societal importance and constitutional nature of the right to petition even though the specific activities at issue were undertaken on behalf of the railroad companies by a public relations firm.); *Sawyer*, 85 F.3d at 731, n.15 (the First Amendment right to petition the government protected the professional lobbyist's employment objectives of "develop[ing] contacts in the Legislature" and of attempting "to persuade and influence legislators to benefit certain interests."); *Jackson*, 72 F.3d at 1386 (a lobbyist's bribery convictions "in no way undercut our nation's commitment to the First Amendment freedom[ ] to lobby. . . . [and] casts no aspersion on the legitimate role professional lobbyists may play in facilitating the exercise of political freedom."); *Moffett*, 360 F. Supp. at 231 ("The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights . . . one does not forfeit First Amendment rights because he pays someone to exercise them for him.") (internal citations omitted); *Fair Political Practices Comm.*, 599 P.2d. at 53 ("The lobbyist's function obviously is to exercise [the First Amendment right to petition] on behalf of his employer" and the lobbyist's activities are therefore protected by the First Amendment.).

Rather than posing an inherent danger to the political process, which must be tightly policed, lobbying "facilitate[s] the exercise of political freedom." *See Jackson*, 72 F.3d at 1386; *c.f. Nofziger*, 878 F.2d at 453. As noted by the Court in *Noerr*, 365 U.S. 127, forbidding the communication of the opinions of interested parties to their representatives would "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition." *Id.* at 139. Indeed, Congress itself has recognized that lobbyists who disclose their clients' identities "serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them." *Harriss*, 347 U.S. at 620, n.10 (quoting S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Congress, 2nd Sess., pp. 32-33). In sum, lobbying aids the ability of citizens to exercise their constitutional right to petition the government for redress of grievances, allows citizens more readily to obtain information from their government officials, and aids in the effective functioning of our representative government by informing representatives of the needs and interests of the citizens. While gift-giving per se may not be constitutionally protected, a failure to draw a bright-line distinction between normal social interaction, which often accompanies the exercise of those rights, and criminalized gift-giving implicates constitutional interests.

2. Statutes Must Be Construed Where Possible to Avoid the Unintended Infringement of First Amendment Rights.

Statutes that infringe upon areas protected by First Amendment guarantees should be narrowly construed to avoid restrictions on those important constitutional rights

where the restrictions were not clearly intended by Congress. In *Noerr*, this Court refused to "lightly impute to Congress an intent to invade" conduct protected by the First Amendment right to petition. 365 U.S. at 138. *See also California Motor Transp. Co.*, 404 U.S. at 510 (quoting *Noerr*, 365 U.S. at 137-38). Citing *Harriss*, 347 U.S. 612, and *Rumely*, 345 U.S. 41, the Court stated "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation." *Noerr*, 365 U.S. at 141. The presumption in favor of the narrow construction of legislation potentially affecting First Amendment rights is particularly strong where criminal sanctions are imposed for the violation of the statute. *See Harriss*, 347 U.S. at 634 (Jackson, J., dissenting) (stating that where a criminal statute regulating First Amendment activities "does not deal with corruption . . . legal penalties should be applied only by formulae as precise and clear as our language will permit.").

Similarly, in *Nofziger*, 878 F.2d 442, the court narrowly interpreted ambiguous statutory language in the Ethics in Government Act that imposed criminal liability for lobbying by former government employees of their former agencies under certain circumstances. *See* 18 U.S.C. § 207(c). Noting the constitutionally protected status of lobbying and that it posed no inherent danger to society, the court refused to interpret ambiguous statutory language to exclude a mens rea element. *Nofziger*, 878 F.2d at 453-54. The court also concluded that section 207(c)'s purpose "to serve the public interest in honest government," alone, was not sufficient to overcome the presumption in favor of a mens re element. *Id.* at 453. The court declined "to treat this statute as a 'public welfare' measure without clear evidence of a congressional purpose to impose strict liability because of its potential for

chilling speech." *Id.* at 454. Similarly, a broad interpretation of the gratuity statute that minimizes Congress' "specific act" intent requirement would impermissibly restrict or chill beneficial political activity by subjecting lobbyists to criminal liability for engaging in normal social relations with government officials.

C. No Congressional Intent Supports a Statutory Interpretation Expanding Criminal Liability Beyond that Provided by the Plain Language of the Statute.

For the reasons stated above, in the absence of clear congressional intent to the contrary, the gratuity statute should be interpreted to avoid the infringement of First Amendment rights and to provide clear notice of the prohibited conduct to potential criminal defendants. No such congressional intent exists here.

1. Statutory Text.

The clearest expression of congressional intent is the plain language of the statutory text. That language simply does not impose criminal liability on donors for making "position" or "capacity" gifts. Congress could easily have done so by simply defining the requisite intent to include: "for or because of the official's capacity to perform official acts" or "for or because of any official act performed, to be performed, or which might be performed." Indeed, in 18 U.S.C. § 213, Congress did criminalize the receipt of certain gratuities by bank and other financial examiners without any reference to an exercise of official authority. The statute provides: "Whoever, being [an examiner covered by the statute]. . . . accepts a loan or gratuity from any bank, corporation, association or entity examined by him or from any person connected therewith shall be" subject to criminal liability. The statute makes no mention of an official act, but simply and

unambiguously imposes liability under narrow and specifically defined circumstances. This clarity stands in sharp contrast to the vague and open-ended imposition of liability that the Independent Counsel and Department of Justice ascribe to the gratuity statute.

2. Legislative History.

Furthermore, the legislative history indicates no congressional intent to impose criminal liability for gifts given to covered officials merely because they have the capacity to affect the interests of the donor. The proposed language of the provision originally read "for or because of an official act performed." However, J.H. Macomber Jr., the General Counsel of the General Services Administration, made the "very minor" suggestion that the language "to be performed" be added because he was not sure that the language as written would apply to prospective action by the official. Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) on the House Comm. of the Judiciary, 86th Cong. 2d Sess., Federal Conflict of Interest Legislation 87-88 (Comm. Print 1960). The casual adoption of this phrase belies any intent to dramatically change the nature of the statute from one merely imposing criminal liability for gifts given for or because of specific official acts performed to one imposing liability for gifts given for or because of the position of the donee or because of his capacity to affect the donor's interests.

This conclusion is supported by Congress' decision not to adopt proposed language that clearly would have brought the acceptance of "position" or "capacity" gifts by federal employees within the scope of the statute. Senator Keating proposed an amendment that would have "prohibit[ed] any government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person . . . conducts operations or activities which are regulated by

the employee's agency or . . . has interests which may be substantially affected by the employee's performance or nonperformance of his official duties." *See* S. Rep. No. 2213, 87th Cong. 2d Sess. 19 (1962), reprinted in 1962 U.S.C.A.A.N. 3852, 3867 (Senator Keating's views). Although Senator Keating withdrew his proposed amendment prior to floor debate, Congress' failure to adopt this language nonetheless suggests that it did not intend to impose liability for gifts relating only to official position or capacity rather than to specific official acts. *Cf. Immigration and Naturalization Serv. v. Cardoza-Forseca*, 480 U.S. 421, 442-43 (1987).

The only legislative history offered by the Independent Counsel in direct support of the "position" reading of the intent element is the statement during the floor debate by Senator Lindsay that the gratuity statute would "elevate[ ] to statutory level some important restraints now in regulations or not covered, particularly relating to gifts and the use of office to obtain something from persons doing business with the Government. . . . " Pet Br. at 35 (citing 1961 Cong. Rec. 14780 (Aug. 7, 1961)). The Independent Counsel concedes that this authority is generally not considered to be persuasive evidence of congressional intent. *Id.* Even Lindsay's comment, however, supports the reading that liability should not be imposed absent a specific act or "use of office." He did not suggest that the mere "capacity to use one's office" to obtain a thing of value would be sufficient to impose criminal liability. This statement simply does not support the almost boundless "position" or "capacity" liability asserted by the Independent Counsel and the Department of Justice. Thus, the legislative history provides no support for these expansive interpretations of the statute.

CONCLUSION

The plain language of the gratuity statute imposes a mens rea requirement that is clear and precise. Congress intentionally created in that statute a bright-line rule placing potential criminal defendants on notice that conduct threatening the health of the political process is forbidden. At the same time, it crafted a rule that would not risk chilling or punishing conduct historically associated with the exercise of First Amendment rights. The gratuity statute is not ambiguous, and it is not incomplete. The phrase "for or because of any official act performed or to be performed" not only means what it says; it fully accommodates the fundamental precepts that neither expansion of criminal liability nor restriction of conduct implicating First Amendment rights are to be lightly inferred. Should the Independent Counsel or the Department of Justice desire a broader reach for this statute, they should seek relief from Congress, not from this Court. The Court should hold that the gratuity statute is violated only where the donor acts for or because of a specific official act performed or to be performed, and affirm the judgment of the court of appeals.

Respectfully submitted,

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